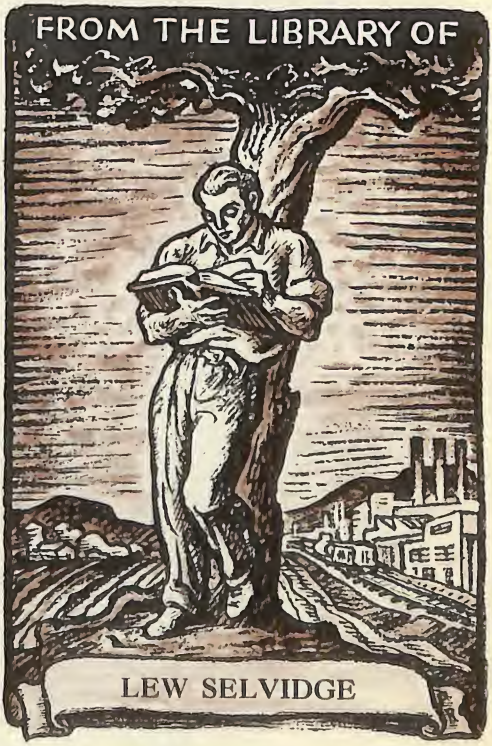
A LIVING DEAD MAN

PHIL. SKILLMAN

Truly Yours

Phil Skillman

Nov 17. 1898



A

LIVING DEAD MAN;

OR THE

STRANGE CASE OF MOSES SCOTT.

AN ACCURATE AND TRUTHFUL NARRATION OF THE COMPLICATIONS CAUSED BY A LITIGANT'S RETURN FROM THE LETHEAN SHORE.

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INTRODUCTORY AND DE(A)DICATORY.

It is perhaps needless to say that the following sketch combines both fact and fiction. This is evident from even a cursory examination. Inasmuch, however, as I am necessarily more familiar with the facts than any reader can be, it may not be out of place for me to indicate in a general way the dividing line between the two.

Under the head of fiction the reader will readily class the records, decisions and proceedings of the several courts; in this he will be undoubtedly correct. All the other matters related or described are facts, pure and simple, of which I have personal knowledge.

It is usual, as I have often observed, not only to write an introductory, but also to dedicate the work; these are usually separately done, though for the life of me I cannot see why they may not be appropriately combined. I shall therefore disregard the usual practice, and I do now in express terms dedicate the following pages to each reader who will solemnly and deliberately declare that he got enjoyment enough out of them to pay for the perusal. As to all others — well, I am thinking seriously of going abroad for the benefit of my health, or creditors, and will ascertain how numerous the latter are before deciding when I will return.

If it helps some wearied attorney to pass away an hour or two while waiting the return of a verdict of his jury which has just retired, it will result in abundant satisfaction to the

AUTHOR.

A LIVING DEAD MAN.

CHAPTER I.

AS YOU LIKE IT.

LIFE is said to be the greatest of mysteries. Death is also considered its key, but unfortunately, after we have obtained the key and unlocked the door, by the same act the door is locked behind us, and those left behind are none the wiser for our experience, for it is pretty generally conceded that a man must be dead at least a thousand years before any confidence is placed in any communication which he may make from the unknown world, and even then it is regarded as hearsay, and not capable of physical or ocular demonstration. Hence, it follows that the world is in a state of confusion; some asserting a proposition they cannot prove; others denying any existence after death, and equally incapable of demonstrating that fact.

From a philosopher's standpoint this subject might wholly be disregarded; but unfortunately the world does not so regard it; but, on the contrary, so far as history can inform us, it has been a subject of much controversy; innumerable books have been written *pro* and *con;* innumerable sermons have been preached; millions and billions of money have been used in building churches and tearing them down; war has been waged; lives have been sacrificed; nations created and destroyed; family ties sundered, and the world generally kept in a constant state of turmoil, when they might just as well have moved the previous question, and referred the whole subject to a committee, with instructions to report one day after death, and in the meantime the world could have taken a recess, or adjourned, and gone to playing solo, or indulged in other convention pastimes pending the report of the committee.

These things weary me, and if I were given to profanity I verily believe I should indulge in that pernicious pastime. The reason for it is this: I was alive and lived on this earth for thirty-five years; then I was dead for ten years, and now I am alive again. The

whole trouble was caused by a fellow by the name of Job, who, about 5000 or 6000 years ago, introduced a joint resolution calling for information on the subject as to whether or not "if a man die shall he live again." Before that time the convention had gone along smoothly and transacted its legitimate business, and since then it has been one continual wrangle.

Mahomet had a big lot of delegates from his ward, who voted solidly with him. The Pope brought a big outside pressure to bear on the convention, and intimidated a good many, especially of the Christians; while the Chinese got up another convention and walled the others out, or themselves in — it makes little difference which — and so it has gone on from bad to worse.

The query may naturally arise as to what all this has to do with me; simply this, that when a man is dead, or declared dead by a court of competent jurisdiction, it is almost impossible to disprove the fact and come to life again. From my experience I would not advise a dead man to attempt it unless he has a barrel of money.

It was once said of a peculiarly unfortunate individual, that it would have been money in his pocket if he had never been born; but I can reverse the rule, and aver, and prove, that it was a dead loss to me as a result of my rash attempt to come to life. Nothing but the Constitution of the United States saved me; I couldn't have succeeded in any other country. But just consider what a serious task it was. Many a live man with plenty of money has started out in search of his legal rights, commencing in the courts of original jurisdiction in the States, and ending up in the Supreme Court of the United States with his money all gone, his friends dead, his youth departed, and the only compensation which he received was a few pages of legal verbiage drooled out by a learned and sapient court, which he could not understand, and which cost money to hire a lawyer to translate.

This being the universal experience of a live man with money, just think of the disadvantage under which a dead pauper labors when *he* attempts to recover his rights, with the courts and juries flinging in his face the fact that he is defunctuary, as it were. I tell you it is a serious and discouraging matter, and no respectable dead man is going to attempt it unless better inducements are held out, and more respect shown him. I had better treatment than that when I was dead, for no one attempted to crowd me out when I drew up to the fire to warm, and I wasn't even asked to chip in to help pay for the firewood. Measured by the standard here, my

associates there would hardly be considered first class, though it is a fact that many of them did move in the first circles before they radiated, as it were. Still, even from that class I received warmer consideration than here.

And so, when I think it all over, I get indignant at the treatment I have received in trying to be alive, and I am satisfied the reader, when he learns the facts, will say, justly so.

Now, without further circumlocution, I will pass on to the actual events of my life.

CHAPTER II.

I AM ALIVE.

I stated before that I was alive for thirty-five years, then dead for a period of ten years, and am now alive again; and if I am not crowded too fast I will tell in subsequent pages how it all happened. But I must have time and proceed in chronological order. Any one with half sense can see that if I were to commence first with the ten years when I was dead, it would be difficult for me to convince any one of the truthfulness of my statements; for, as I remarked before, people have no confidence in the word of a dead man, or at least until he has been dead so long as to cast a natural discredit on his memory.

There was nothing unnatural or supernatural about my birth, childhood, or early manhood. I was not a seventh son, nor born under the malign or beneficent influence of any star, nor during any eclipse of the sun, nor while the moon was in limbo. Contemporaneous celestial history records no violent or mysterious movements of the heavenly bodies on my account. If there is any account of that sort against me it is clearly outlawed, and I shall claim the benefit of the statute of limitations — you hear my *tum tum*.

I came of a distinguished family, at least so far as both given and surname will indicate. The family name, Scott, was derived from Great Scott, of whom I am a lineal descendant. I need not inform the reader of the particulars of his life, nor of the associations which cluster around his name. Every household has heard his name uttered, connected with events both great and small, and I have heard strangers in foreign lands, and even those who have but a limited knowledge of the English language, invoke his name with the most intense earnestness and satisfaction.

My given name, Moses, is not without historical significance. Many of my readers have doubtless read or heard of the first Moses. He was an estimable gentleman in many respects, though some of his transactions were somewhat shady, especially when he slew the Egyptian and hid his body in the sand. I think he was the grandson of Jacob, who put up a job on his father-in-law, Mr. Laban, who had a big cattle ranch, and got a whole lot the better of him on the round up, when they separated the brands. Laban did think of going to law about it, but as he lived in another county, the judge required security for costs. Instead of going about it in a business-like way, and putting up a good bond, Laban came the pauper act, and got caught at it. As at the present time, if a man would make an affidavit that he was too poor to put up the costs of the sheriff for serving the papers on the defendant, and for witness and clerk fees, the court adjudged that he might prosecute the case *in forma pauperis*. Laban, being avaricious, made this application, and probably would have succeeded, but Jacob was too swift for him. He put the judge on to the scheme, and told him that Laban had a nice lot of steers herding out up in the mountains, and had plenty of money to put up for costs; and although Laban tried to wriggle out of it by saying the steers were chattel mortgaged up to their full value, yet Jacob clearly proved that the mortgage was fraudulent and given with intent to cheat and defraud his creditors. So the judge denied Laban's application, and came very near binding him over to the next grand jury for false swearing.

A long time after this Moses is said to have had some idea of coming to life again, and he must have tried it enough to look the ground over; at least, several reputable witnesses say they saw him. But he probably did not have as much confidence in judges and juries as I had, and concluded his show of getting his property back wouldn't pay for what it would cost him. I am half inclined to think I would be better off had I followed his example.

I am a little uncertain as to what Moses' other name was, but from the best information I have, it was Scott. My reason for it is this: Some 2000 years ago or more Scotland was founded by my ancestors, the McScotts, and *they* claimed to be the direct descendants of Moses. Some of them wrote their names M. Scott, some Mac Scott, and some Mos Scott. Being careless about their autographs, the family name has gone a little astray. This is not at all surprising. Take the case of Mr. Shakespeare, who adorned life in the sixteenth century. He is variously called "Shake," Shagspar, Shaksper,

Immortal Bill, etc., etc. Probably he wrote as many books as Mose did, though of a somewhat different character; and it is also quite probable that he was not as efficient in the frog and locust and boil business as the original Moses, but just see what history has done with his name! It is said that only one authentic signature of Shakespeare remains, and even that was not discovered until they applied the same key to it which is used in deciphering the Egyptian hieroglyphics. Is it any wonder, then, that I have only *one less* undoubted signature of the original Moses who antedated him some 4000 years? I am sorry I didn't have this fact brought out on the trial; I wanted to, but my lawyers said it was immaterial. If it had been brought out I am almost certain the Supreme Court of the State of Washington wouldn't have gotten so muddled over my case.

Something like the above at Mose-phere surrounded my early happy days. I worked and played; I studied and idled. I lived near to nature's heart, wherever or whatever it is; I hunted and fished; I became acquainted with the gentle, beautiful, bow-legged, clam-eating Siwash, and learned to patter their Chinock lingo. I built me a log castle on the classic shores of Skookumchuck, and I pulled the long-necked goeduck from the sands of Budd's Inlet; but still I was not happy; an unseen hand was beckoning me away. The migratory instinct so readily observable in certain species of birds and animals seems also to exist in man, and often manifests itself strongly with no apparent reason therefor. There is a restless longing for change, for motion, for travel, which can neither be compromised nor satisfied, save by surrender to its behest. Reason as we may with this intangible spirit, present unanswerable arguments against it, still the unsatisfied longing exists and torments us until we obey its inexorable mandate. I verily believe that in certain instances it has manifested itself so strongly that individuals have voluntarily, deliberately and sanely severed their physical existence, in order to satisfy and gratify their desire to explore the realms of the unknown world. I am aware that it is generally thought and believed that the love of life is so strong that, if it were in our power, we would eternally prolong our earthly life rather than face the mysteries of death, or the shuddering possibility of being absolutely snuffed out of existence. Notwithstanding this teaching and theory there comes at times to all philosophic and reflecting minds an intense longing to explore the mysteries of another life, and our very feet seem shod with impatience. Could we our "quietus make," without the use of a "bare bodkin," and be assured of escap-

ing the pain which we naturally associate with dissolution; could we "with the wink of an eye" or the "draught of a breath" bridge this yawning chasm, myriads of mortals would disappear, not impelled thereto by disappointment or other ills of life, but purely and simply in obedience to a natural desire interwoven with every fiber of our existence. The faint "honk, honk" wafted back to us from the wedge-shaped flight of the wild birds, as they disappear from sight on their confident journey toward an unknown country, is but typical of the final farewell of many a mortal who, with equal confidence, has launched himself into eternity, in search of a realm which attracts him with irresistible force. The spirit will as surely reach its abiding place as the wild bird its home in the north. It is but the operation of a mysterious law, which we cannot now, but some day will, understand; and "whence it comes, or whither it goes, we know not."

Something of this migratory spirit invaded me in the spring of 1881, although no reason in the world existed why I should change my place of abode. However, there was nothing to prevent my doing so, nor would my interests in any way suffer. Therefore, without any well-defined idea of my destination, I wandered up to Seattle. Here I met an old acquaintance, Captain Reefer, whose ship, the *Golden Horn*, was then in port, and just ready to depart on a tramp toward the southern seas. In an aimless way, and prompted by his friendly invitation, I accompanied him on board, thinking I would stop off somewhere down the coast. Our journey was very pleasant down the Sound, through the Straits of Fuca, and thence southerly along the coast. On the second day out we encountered a storm, but nothing serious was apprehended. About midnight I had gone to my room, when a tremendous lurch of the ship occurred, accompanied by a terrific sound. I somewhat hastily ascended to the deck, and was instantly swept into the air and swallowed by the hurricane of darkness, wind, noise and water. I must have lost consciousness within a few seconds, but how long I so remained, or my surroundings, is only a matter of speculation. When I came to myself I was neither on the ship, nor in the sea, nor on land; in fact, I never saw the earth, nor any of its belongings, for many years afterwards. Just where I was or what my surroundings it is not necessary to relate. Suffice it that I was contented and happy, and my longing for change was abundantly, though somewhat unexpectedly, satisfied.

CHAPTER III.

I AM DEAD.

I cannot truly say that I was wearied with my labors, for I was living in the land where the weary are said to be at rest, but I was indulging in what would be more properly termed relaxation, an enjoyment somewhat passive in its nature. I had stepped into a light shallop, pushed it off from shore, and was lying prone on my back in its velvet interior, watching the shifting lights in the azure atmosphere, gently lulled by the lapping of the waters and the undulating movements of the boat, when I heard some one call from the shore. Arising slowly and dreamily, I looked in the direction of the call, and saw a youth beckoning me. I gently propelled the boat toward shore, while the youth amused himself by gathering up the diamonds on the beach by the handful, tossing them one by one into the limpid water, and watching the circling ripples which widened and chased each other across its placid face. When I drew near I noticed that he was in slight uniform, and I waited to learn what he wanted.

"Is your name Scott?"

"Yes."

"Moses Scott?"

"Yes."

"Well, you are wanted down to the telephone."

"Which office?"

"The central."

"Very good, I will be there directly."

Stepping out of the shallop, I passed slowly down a beautiful avenue until I came to a large circular building and passed through into the interior. Stopping for a moment, I looked at the inscriptions over the doors of the several departments, until I found the one I wanted, and passed within. Addressing the operator, I said:

"I have just been notified that some one wants to talk with me."

"Your name is Scott?"

"Yes."

"The earth wants you; step right in there."

As I stepped into a small inclosure I heard the "Central" say: "All right; he is here."

I sat down in a chair before a very brilliant mirror, and placed the 'phone at my ear.

Right here I desire to say that the celestial telephone, by some process which I do not understand, enables one not only to hear what is said, but also to see perfectly in the mirror, not only the face of the person talking, but all within the room, and all the surroundings, just as plainly as though sitting face to face. I rang the bell and said:

"Hello."

"Hello."

"Is this the earth?"

"Yes."

"This is Scott, Moses Scott; what is wanted?"

"There is something taking place in Washington which you ought to know."

"Which Washington?"

"Territory of Washington, at Olympia, the capital."

"What is it?"

"Well, I will just connect you with the court-house and you can see for yourself. Please be as expeditious as possible, as there is a good deal of work over the line just at present, and beside, the wire is liable to go down any time."

"How is that?"

"Oh, some of Satan's imps are loose again down in the atmosphere close to the earth, and they just delight to dance on the wire and melt it off."

"I thought they had all been cleaned out of that territory?"

"So did I; but there has just been a change of administration, and they are thicker than ever."

"All right; I'll hurry."

I looked in the mirror and instantly seemed to be transferred to earth. There was the old court-house on the hill; the air was redolent with the perfume of flowers, while in the distance grand old Mt. Rainier reared its triple crest, bathed in a halo of crimson and azure. To the northwest lay the majestic Olympic range, snow-clad, silent and solemn, nature's most beautiful cameo framed in the northern sky. It reminded me of celestial scenery.

Within the court-room still stood the high desk in the corner, with the same patriarchal clerk with flowing whiskers. A new man to me was on the bench, while a few attorneys and witnesses were down in front. The judge of probate sorted out some papers and remarked:

"This is the day set for hearing the petition for letters of admin-

istration in the case of Moses Scott, deceased. The evidence was submitted this morning, and while the proof of death is not conclusive, still it does show an unexplained absence of over seven years, from which death may be presumed. The petition seems to be in due form; notice has been given, and no objection having been made, letters of administration will be granted as prayed for."

Here the judge signed a paper and passed it to the clerk. Continuing, he said:

"Read the petition and letters, and if no objection is heard the order of the court will be entered of record." I listened intently and heard the clerk read as follows:

"In the Probate Court in and for the County of Thurston, Territory of Washington:

In the Matter of the Estate of Moses Scott, Deceased.

To the Honorable M. A. Root, *Judge of the above court:*

Mary Scott, your petitioner, respectfully shows:

1. That one Moses H. Scott, heretofore a resident of the above-named county and Territory, mysteriously disappeared some time during the month of March, A. D. 1881, and more than seven years ago.

2. That careful inquiry made by relatives and friends of said Moses H. Scott at different times since his said disappearance has failed to give any trace or information of his whereabouts, or any evidence that he is still living.

3. That your petitioner verily believes that said Moses H. Scott is dead, and has been dead from the time of his said disappearance.

4. That said Moses H. Scott was never married, and left no last will or testament yet heard of.

5. That said Moses H. Scott left real estate in his own right, in Thurston County, Territory of Washington, of the value of six hundred dollars, more or less.

6. That the heirs of said Moses H. Scott, to the best of your petitioner's knowledge and belief, are: Samuel Scott, aged about 18 years; Anna Rebecca Scott, aged about 16 years; and Fannie Elizabeth Scott, aged about 14 years, the three living children of a deceased brother of said Moses H. Scott.

7. That your petitioner is a judgment creditor of said Moses H. Scott, and holds an unsatisfied judgment against him.

8. That R. H. Milroy, of Olympia, Washington Territory, is a suitable and proper person to act as administrator of the estate of said Moses H. Scott, deceased.

WHEREFORE, your petitioner prays that letters of administration upon the estate of Moses H. Scott, deceased, be issued to said R. H. Milroy, and your petitioner will every pray, etc.

MARY SCOTT."

STATE OF CALIFORNIA, County of Santa Clara. } *ss.:*

Mary Scott, being by me first duly sworn, upon her oath deposes and says: That she is the petitioner above named; that she has read the foregoing petition and knows the contents thereof, and believes the same to be true.

As witness my hand and seal of. MARY SCOTT.

Subscribed and sworn to before me this 2nd day of April, 1888. }

H. F. DUSEY,
Notary Public.

PROBATE NOTICE.

IN THE PROBATE COURT OF THURSTON COUNTY, W. T.

Mary Scott having filed in this court a petition praying the appointment of R. H. Milroy as administrator of the estate of Moses H. Scott, notice is hereby given that the hearing and consideration of said petition has been fixed for Friday, April 20, 1888, at 10 o'clock A. M., at the office of the undersigned.

M. A. ROOT,
Probate Judge.

April 7, 1888.

TERRITORY OF WASHINGTON, County of Thurston. } *ss.:*

I, V. A. Milroy, being first duly sworn, on oath say: That I am a citizen of the Territory of Washington, above the age of 21 years, not interested in the estate of Moses H. Scott; that I posted three

copies of the within notice in three of the public places of the County of Thurston, W. T., as by law required, on the 7th day of April, 1888.

V. A. MILROY.

Subscribed and sworn to before me this 20th day of April, 1888.

GEORGE M. SAVAGE,
Notary Public.

[SEAL]

IN THE PROBATE COURT OF THURSTON COUNTY.

In the Matter of the Estate of Moses H. Scott.

The petition of Mary Scott for the appointment of R. H. Milroy as administrator of the above-named estate, coming on this day to be heard, and due proof having been made that due notice of said hearing had been posted in three public places, as required by law, at least ten days before this day; George M. Savage and Francis Henry giving evidence before the court, and it duly appearing that said Moses H. Scott disappeared over seven years ago, and that since said time nothing has been heard or known of him by his relatives and acquaintances, and that said relatives and acquaintances believe him to be dead, and that his surroundings when last seen (about eight years ago), and the circumstances of that time, and immediately and shortly afterwards, were such as to give his relatives and acquaintances the belief that he was murdered at about that time; and it appearing that he has estate in this county;

Now, therefore, *the court find that the said Moses H. Scott is dead to all legal intents and purposes,* having died on or about March 25, 1888; and no objection having been filed or made to the said petition of Mary Scott, and the guardian *ad litem* of the minor heirs herein consenting, it is ordered that said R. H. Milroy be appointed administrator of said estate, and that letters of ~~administration~~ Guardianship issue to him upon his filing a good and sufficient bond in the sum of one thousand dollars.

M. A. ROOT,
Probate Judge.

Dated April 20, 1888.

CHAPTER IV.

I DECIDE TO COME TO LIFE.

As the reading proceeded I became not only intensely interested, but finally uncontrollably indignant. "It is a lie, I shouted," starting up; "I don't owe anything on the judgment, and I wasn't murdered, either."

In my excitement I dropped the 'phone and dashed forward, only to find the scene vanished and myself violently in contact with the mirror. I suddenly realized what I had known before, but which in my rage I had momentarily forgotten, that while I could see and hear, and seemed to be actually present, still I was millions of leagues ~~of miles~~ distant, and could not manifest myself either to their sight or senses.

I seized the 'phone, seated myself and rung the bell, I fear, somewhat violently. I received no response to my repeated hello's, while I thought I detected a faint smell of sulphur. Just my luck; the wire was undoubtedly broken, and it was only a matter of speculation just how serious the break was, or when it would be repaired. I learned afterwards that it had been smashed by a comet, and a good deal of time must necessarily elapse before communication would be again opened. I tried to have them connect me by way of Venus, but was told the message would have to be repeated, as the Venusans did not understand our language. I wandered away not a little depressed; indeed, I was disconsolate. I didn't care much about my property on earth; in fact, had become largely indifferent toward it. Still, I didn't owe the judgment. What troubled me most was, that they thought I had been murdered, and doubtless suspicion was cast on some one, and even now he might be in custody, perhaps on trial charged with my taking off. No one could tell what a jury might do, and some innocent man, perhaps one of my best friends, might innocently suffer death. Such things have happened, and might happen again. I was in torture, and tried to invent or discover some method by which I could prevent this awful catastrophe. Finally I went to the headquarters of the Telephone Company and interviewed the general manager.

"Cannot you devise some method to put me in communication with the earth, so that I can give my testimony there to save the life of a friend falsely charged with murdering me?"

He shook his head. "It is like this," he said; "we have been

trying for a good many hundred years to do just what you propose, and probably we would have succeeded long ago if they would help at the other end of the line. We have, indeed, in a few instances, succeeded, but generally they are so stupid, and get so scared and superstitious over what is a plain matter of business, if they could only really consider it so, that the attempts have been practically failures, and exceedingly discouraging. If they only knew it, it would be for their own good, and we could readily give them a great deal of valuable information, and it would prove a good paying business for all concerned. We have gotten this far, as you have seen; we can connect with the earth, and see and hear what transpires there; but when we attempt to make ourselves known to them, to explain our business and the fact that it would be mutually profitable and a good investment, they act like a lot of sheep, and run as if they were chased by wolves. They have only the remnants of an old line that was practically abandoned many years ago. It had none of the modern improvements, and proved unsatisfactory. Occasionally we do strike a bright, enterprising fellow, who gets interested and seems to understand the business, but when he gets out his prospectus and tries to interest capital and business, they not only look on him with distrust, but generally regard him as a witch or lunatic. Actually, if you will believe me, they got after some of our agents, arrested them, tried them and hung them. Some they burned, others they tortured or sent up for life. This, as you can readily see, was discouraging, and I advised our company to stop trying to do business with people who hadn't sense enough to appreciate a good thing when they saw it. Still, for the accommodation of our own people, who want to keep posted about earthly news, we maintain the line as you have seen. It would be much more profitable, however, if the lunatics at the other end of the line would come to their senses and try and reciprocate. Now, take the lines to Mars, Venus, Jupiter, or even the long-distance line to the Pleaides, and they all do a paying business, the stock is way above par, while the stock in the line to that little third-rate locality," and he made an expressive gesture toward the earth, "is just kicked about as rubbish. I tried to use some the other day as collateral security for a small loan, and they just laughed at me. I took the stuff on a bad debt, and I am only the poorer for it. I have been trying to get the other planets to start a colony down there, but they don't look very favorably on the project, and from my experience I don't know as I can blame them."

"My dear sir," I replied, "this may be very interesting to you, but what I want to know is, how I am going to get into court down there and save the life of an innocent man."

"Why don't you go yourself? I think you can get a ticket-of-leave for a short time, and I will give you a note to the General Ticket Agent of the Inter-planet (Limited) Company, and he will give you necessary directions. What do you say?"

"I suppose this is the best thing to do, and I will esteem it a favor if you will give me a line to him as you suggest."

With that he took up a block of what looked like ordinary letter paper, gazed at it perhaps two seconds, tore off a leaf, folded it, placed it in an envelope, glanced at the envelope, and handed it to me. I took it mechanically and hesitated, wondering if he was sending me on a fool's errand with a blank piece of paper in the envelope.

"You will find the office just across the square, in the Garnet Block, first door to right of main entrance."

"I thought you were going to write me a line?"

"So I have; you will find it all right in the envelope."

"But you certainly didn't write anything while I was here."

He laughed merrily. "Oh, I see," he said, "you are still with the back-numbers. This paper," he continued, taking up the same block, "is sensitive, and I have only to think what I want and it is immediately transferred to paper."

"But I should think it would be rather embarrassing to find your thoughts materialized on every stray piece of paper scattered about the office."

"Not at all," he replied. "I just make this pass over the paper and it becomes sensitive; by this motion," and he waived his hand, "it becomes marble, so far as receiving impressions is concerned."

I somewhat stupidly said, "I see," when I didn't see at all; thanked him and turned away.

"Look here," he called to me just as I reached the door; "better be a little careful when you get down to the earth again. From all I can learn they don't take kindly to a fellow coming back. Ten to one they won't believe you, and you may get jerked up as an impostor."

"Why, I have plenty of friends back there, and they will be glad to see me, and help me along."

"Well, you'll find friendship don't count against superstition. I wouldn't advise a cherubim to try it unless he was eternally tired of Paradise, much less a leaden-shod mortal.

I own I had some misgivings, and was minded to abandon the trip; but on reflection I thought better of it. I had been there and it wouldn't be like going among strangers. He had only endeavored to open business communication with them, and traffic and capital are proverbially cautious as well as exacting. Doubtless he exaggerated and may have been misinformed. I entered the Garnet Building, found the general agent, and delivered the note. He read it and then looked at me somewhat searchingly, as if puzzled about something. I said I would like a round-trip ticket.

"Can't possibly accommodate you," he said.

"But I must go."

"But, my dear sir, we only run regular as far as Venus; we will furnish you a round trip to that station, but from there on you will have to rely on a tie pass."

"How far is it?"

"Oh, not far, only about twenty-five million miles."

"Country settled?"

"Well, no; you will have to fill your haversack and rely on that."

"Why don't you extend the road clear through?"

"Oh, it is graded and tied and ironed all right, but there ain't business enough to pay for running beyond Venus."

"I should think there would be plenty."

"That's just where you are mistaken. You are the first applicant for a ticket we have had for years."

"How about travel this way?"

"There is very little. Most of them prefer to linger around the earth, and watch their property scatter, and cling to their old superstitions, and keep themselves generally miserable."

"Can't I get a hand-car or a go-devil from Venus?"

"I wouldn't wonder if you could."

"Well, I will chance it. Let me have a round-trip ticket."

"All right; here you are."

With that he handed me an envelope with an inclosure. I asked the price, and began to wonder if I had the wherewith to pay for it. He smiled and said: "I see you are not familiar with our way of doing business. The ticket costs nothing." I was not a little amazed, and replied that "of course I expected to pay."

"Why should you pay anything," he said; "we do this work for the love of it; wealth is of no use to us, as we have everything we want or need simply for the asking."

"Do you mean to say," I inquired, "that you have no regular company, with paid employes, regular salaries and all that?"

"I mean just that. We must keep busy in order to enjoy ourselves, to keep alive, so each one naturally selects the occupation he likes best, and we enjoy it as thoroughly as you enjoyed playing when a boy."

I was interested in what he said, but being impatient to get started, I thanked him and turned away. As I did so he inquired "what arrangements I had made for materializing when I reached the earth."

"I don't understand," I replied; "I supposed when I reached the earth I could just step off and proceed to business."

"You have doubtless forgotten," said he, very politely, "that you are now spiritualized, and in order to be successful on your return to earth you will have to resume your former material body."

I immediately realized that what he said was true, and yet it is a solemn fact that I had not recognized it before. I hadn't noticed any change in myself — I looked the same; I walked, talked, and doubtless weighed as much as ever I did. He was evidently aware of what was passing in my mind, for when I moved toward a pair of scales standing in the corner he remarked: "Just set that sack of pearls off if you will be so kind. I set them on the scales to get them out of the way. They were sent here as an advertisement of a new world discovered not long ago, and no one seems to care anything about them; in fact, no one will take them as a gift."

As I set the sack aside I saw it was filled with the most wonderfully beautiful pearls I ever beheld or imagined. "Help yourself," he said, as carelessly as though they had been peanuts.

I stepped on the scales and balanced at exactly 162 pounds, my usual weight. When I announced the result he laughed.

"That is all right, but when you step on the earth you won't weigh as much as a puff of the east wind."

With that he stepped to a cabinet, and taking out a small metal flask, handed it to me, saying: "Take this, and when you step on the earth take a swallow of it, and instantly you will become materialized. You will have to take a little along occasionally, otherwise you will etherealize again. There is enough to last about ten years. It is called the 'Immortal Materializer,' though that is overdrawn as it really operates for a limited time. Another thing: as you approach the end of the line a short distance from the earth you will find that the tracks divide and spread out like a fan. You will

approach the earth towards its side, and the tracks are arranged to correspond with its parallels of latitude. Select the track that will carry you to the latitude desired. Of course, you are liable to strike the circle on the opposite side of the earth, but by observing it carefully as it rolls under you you can alight when it presents the proper longitude. I think these are all the directions you will need, and I wish you abundant success.

CHAPTER V.

THE JOURNEY TO EARTH.

The journey as far as Venus was quickly made. Our carriage had every convenience and every luxury. When hungry or thirsty the touch of a button brought exactly what was desired. There was a bill-of-fare hung up at each compartment, and separate electric buttons for each dish. The food was not brought in by hand, but sent along a little covered side-track, and announced itself by a slight ring of a bell when it reached its destination.

As before stated, there was no expense attending travel; everything was done by volunteers who deemed themselves fully compensated in the enjoyment derived in administering to the comfort and happiness of others.

I saw no tramps along the route, nor were there any second-class carriages. Ample room was provided for all, and all seemed happy and contented. It seemed a little odd not to hear travelers discuss the price of stocks, the markets, mines, politics, strikes, foreign news, etc., but it is a solemn fact that I did not hear a single one of these subjects referred to.

Not a drummer with his sample trunk; not an insurance agent with his lightning calculator; not a jeweler with his case; not a cigar or liquor man did I encounter.

On the contrary, all seemed engaged in a pleasure trip. The conversation was artistic and literary in its nature, and although none of us had ever met before, there was nothing of the social atmosphere which usually surrounds strangers suddenly thrown together. The utmost politeness and good-breeding prevailed, and all manifested the quiet ease of perfect enjoyment.

When I arrived at Venus I immediately went to the earth station, which I found almost deserted and very dilapidated. A single person was in charge of the station, and he expressed not a little sur-

prise when I informed him of my destination. However, he finally fell to, filled my haversack with good lunch, got me a go-devil, oiled it, placed it on the track and gave me necessary directions as to the route. Although I might not need it, he said, I had better take a time-card, and he apologized for its age, A. D. 150, saying that all regular trains had been suspended about that date.

Bidding him good-bye, I started out on my lonely journey of about twenty-five million miles. I calculated to make the trip in something like three days. I jogged along leisurely, as I wanted to see the country. I noticed distance posts placed at each ten thousand-mile point, and I regulated my speed so as to pass one every two minutes, or a little less. At a distance of about eight thousand miles from the earth, as shown by the time-card, I came to where the tracks forked and spread out like an open fan. Selecting the one which indicated 47° north latitude, I commenced a leisurely journey forward. I soon came in sight of the earth, and could discern enough of its surface to indicate its rotary motion. It seemed to be turning slowly toward me, presenting new phases every moment. Leaving my go-devil I swung off into space, controlling my speed and direction as easily as a fish in the water. As near as I can judge, I must have approached the earth in the vicinity of Quebec, and I remained suspended in the air while the western world slowly turned toward me. Lake Superior passed beneath me, and I easily recognized Duluth, the "zenith city of the unsalted sea." Proctor Knott, in his celebrated Duluth speech, was an unconscious prophet, for it seemed to possess many of the elements of greatness so humorously described by him.

It had now been nearly ten years since I last saw the earth, and I find it hard to analyze, much less describe, my emotions on thus meeting an old friend. Unconsciously I fell into a musing attitude, which soon found utterance in words, as if the earth were giving heed with kindly ear to the experiences which I brought from remote worlds. "Old friend, I greet you once again! My first conscious existence was had upon your breast. You nourished and sustained me, buffeted and buried me. I was your servant, your slave, chained and in duress. Whither you went, I went. To my prayers and entreaties as to the length of your journey, or whither bound, you vouchsafed no answer. Had you gone astray and suffered hopeless wreck, I should have been involved in your ruin, with none to write our epitaph. As if in very contempt of the pigmy mortals who roamed over your surface, you rolled on and on, nor

giving heed to our sorrows, nor sharing in our joys, wrapped in an eternal silence. As well might I have appealed to the remotest orb as to expect answer from such a silent and remorseless sphynx. How is it now? I am your slave no longer. I am free and independent of you, and can spurn you, even as you disregarded me. You are now chained and confined within your little orbit, and whether you will or no, must ever roll on at the bidding of a Mightier Power. The most infinitesimal grain of sand upon your seashore, as compared with you, is greater than you when measured by the numberless worlds and the eternity of time and space with which you are surrounded. I can wing my way through measureless space to which you must ever be a stranger. My companions are worlds so distant and glorious that the knowledge of you comes only like the flitting fancies of a troubled dream. The limits of my existence, and the power which I possess, are now as far in excess of yours as yours were once of mine. Still, it is with no feeling of contempt that I note the change. I bear you no malice, and will ever remember you kindly. Let the sorrows of the past be buried deep beneath the joys of the present. 'Peace be within thy walls and prosperity within thy palaces.' If ever you find yourself far from home, without friends, among strangers, dead broke, famished with hunger and thirst, strike me for my last quarter, and should you, like many another tramp I have succored, disappear down the first dark alley, blow in your money for poor whiskey, get riotously drunk, and fetch up the next morning in a demoralized condition before the police magistrate, there will be no kick coming on my part."

Just then the approach of the Rocky Mountains became manifest, and I was obliged to ascend in order to avoid coming in contact with them. Slowly but majestically they disappeared in the east, while the Cascade Range loomed up in the west. On past the Cascades and just grazing the top of Mt. Rainier I seemed to glide, until the entire Puget Sound country spread out like a map. What was my chagrin to find Budd's Inlet wrapped in a dense fog, and not a stopping-place was discernible. I tried to penetrate the fog, but feared lodging in the top of some lofty fir tree, for I had to materialize the moment I came in contact with the earth. As a matter of safety I determined to wait until the earth came around again, and with a slight effort rose to a higher and clearer altitude. As I passed the Black Hills the Pacific Ocean came in view, clear and serene. I descended close to the earth at the ocean beach, "where

the tide ebbs and flows twice in twenty-four hours;" a short distance out I saw a steamer headed north, evidently bound for the sound by way of the Straits of Fuca. It was directly in my path, so I determined to board her. Guiding myself carefully, I stepped on the after-deck, and at the same instant took a draught of the Immortal Materialized from my flask. The result was not only disastrous, but totally unexpected. I materialized all right, but I had overlooked the effect of the force of gravity which instantly operated, and by coming in contact with the steamer it was like an ordinary person suddenly stepping on the top of a fast-moving train, and like a rubber ball I bounded off into the ocean. Fortunately, I was not hurt, and being a good swimmer, I readily regained the surface and shouted for assistance. The man on the lookout heard me, the alarm was given, and soon a boat came to my rescue, and I was taken aboard. It seems that not a soul had seen me alight on the steamer, all hands being below on devotional exercises, or splicing the main brace. As we approached the steamer, what was my amazement on finding it the identical *Golden Horn*, from whose deck, at this identical spot, I had been blown overboard some ten years before. As I clambered over the side of the steamer and stepped on deck, the first man to greet me was Captain Reefer, who recognized me instantly. "What in *hell* were you doing out there in the ocean?" was his first remark. I explained to him that I had been waiting here for his return, as I had changed my mind about going to San Francisco; that I had a return ticket and didn't care to go to the expense of paying fare back on another steamer. He looked as if he didn't more than half believe me, but was too much of a gentleman to dispute my word. He did remark, however, that he wondered how I could content myself so long in what had evidently been a pretty damp state-room. I explained to him that my physicians had prescribed salt baths for my health, and having the leisure and opportunity, had availed myself of them pending his arrival. This, of course, was satisfactory, as well as a natural solution, and the subject was not referred to again.

CHAPTER VI.

THE TRIAL.

As I stepped off the boat at Olympia, from whence I had started nearly ten years before, I saw many familiar faces, as well as others

that had been changed during my absence. The wharf and buildings, as well as the business part of the city, had changed greatly, and although I had been familiar with every foot of the place, I had to take my bearings anew. Most of the faces of those I met were new to me, and even my old friends, as well as myself, had changed; consequently it was some time before I felt at home again. I soon ascertained that little interest had attached to my disappearance (how soon we are forgotten!), and the suggestion of murder contained in the probate proceeding was never acted upon officially. This gave me great relief, and I began to regret my return; but knowing that I could translate myself again at any time simply by omitting to take the Immortal Materializer, I finally concluded to remain long enough to place my property in a more satisfactory condition. The property had been sold under the probate proceedings, and in many instances buildings had been erected and other improvements made. I had no desire to wrong any one, still I wanted my property; consequently, after my personal identity had been fully established through recognition of old friends, I went to the purchasers of my property, and either bought of, or sold to them, thus making an equitable settlement. In one case, however, I could do neither, and a certain ranch then occupied by certain parties named McNeil remained in dispute. There was only one remedy left, and after exhausting all other means I directed my attorneys to enforce my legal rights, with the intention, if successful, of still allowing compensation for improvements.

I little dreamed of the result of my action, or of the perplexing questions which would arise, or of the contradictory decisions which were about to be evoked. As will be seen later on, when I attempted to assert my rights the courts said I was dead; and when, in another court, I claimed as a defense the privilege of being dead, this was denied me, and I was declared alive. If I had reversed the thing and brought suit as a dead man, and defended as a live one, I should have probably won on both; as it was I lost both ways. I "coppered" when I should have played "open," and *vice versa.*

I am not well enough posted in legal parlance to properly describe the history of the trial of my case in the Superior Court. I have no transcript of the evidence, nor can I accurately define the law points raised in the case. In fact, most of the points might be properly labeled point-no-point. Therefore I shall describe what occurred simply in my own way, and as *I* understood it.

After other cases had been heard, the Judge announced that Scott

v. McNeil stood next for trial. The clerk began pulling slips of paper out of the box, and called out a name for every slip. I mistrust they were blank pieces of paper, for he tripped up several times and called the names of some who were then out on another jury. My impression is that he had a poll-list in front of him, and read from that. It seemed to be an old list, too, as he called several who had been dead quite a number of years. It was evidently a trick put up by the lawyers on the other side, as they somewhat sneeringly intimated that inasmuch as I was dead I ought not to object to being tried by a jury of my peers; in other words, a corpse jury. Personally I did not object, as I was satisfied that a jury of dead men would guess as near right on a verdict as the average jury of live men. The Judge, however, was dead against me, as he allowed a peremptory challenge to every dead man called. He said somewhat facetiously, if he allowed a jury of that sort to be empaneled, in order to make it comfortable for them it would be necessary to raise the temperature of the court-room to such a degree as to render it exceedingly uncomfortable for the rest, all of which would be distressingly premature, or words to that effect. The Judge seemed to have a personal interest in the matter, and insisted on having his way. My lawyers took an exception to the ruling (which was the only thing in sight that they could take), and told me they were confident they could reverse the case in the Supreme Court on account of this erroneous ruling, in case the jury found against me. They said they were working to get as many errors as possible in the record just on that account. That may be the correct method of trying lawsuits, but it seemed to me just like a man going deliberately into the pastime of sitting down on carpet tacks just for the pleasure of pulling them out afterwards.

After a while they got twelve men in the jury-box, and then they all stood up and held up their right hands, and the clerk mumbled out something about answering questions relating to their qualifications, and then they sat down. I supposed, of course, the trial of my case had begun, but instead of that, the lawyers and court began to try the jury. First one lawyer would talk to a juryman, and ask his age, and where he lived, and what his business, and if he would convict on circumstantial evidence, and if he belonged to the A. P. A., or had formed or expressed any opinion of the case, or was related to either party by affinity or consanguinity up to the fourth degree, and wound up by saying, "We challenge the juror for cause."

I expected a fight or a foot race, of course, when a man deliberately challenged another in such a public manner, and I looked for the sheriff to arrest the parties at least, and for the Judge to fine them or send them to jail. Nothing of the sort happened. On the contrary, the Judge turned to the other lawyers and asked if they resisted the challenge. If they said they didn't, then the juryman looked mad and left the box, and the clerk delved down into his tombstone record for another to take his place. If they said they *did* resist the challenge, then *they* went at the juryman and asked a lot more of fool questions, and then the Judge chipped in and had his say. One juryman, whose mouth was carved cornerwise across his countenance, was challenged on account of bias, and was actually excused on that account. My lawyers tried to get rid of a fellow who was cross-eyed, and although it was plainly apparent that nature had made more of a botch of his countenance than the other one with the bias mouth, still the Judge let him stay. When asked his name, he replied:

"Seymour."

"Have you ever served on a jury before?"

"No."

"How old are you?"

"Forty-one."

"Are you married?"

"No."

"If the Court please, we challenge this juror."

"State the grounds of your challenge."

"Strabismus."

"What?"

"Strabismus."

"You mean he is cross-eyed. That is not one of the grounds of challenge allowed by the code."

"True, your honor, but a juror is subject to challenge for causes other than those specified in the statute. A juror must possess certain faculties in order to be qualified. He must be able to hear, to understand and to see. Is a deaf man eligible, or one who does not possess understanding? Certainly not. And the same rule applies to one who cannot see, or sees too much, or cannot see straight. You cannot tell when a witness is lying or how much he is lying simply by hearing him testify; it is necessary to see him, and note his expressions. Now this man Seymour would see more faces and a greater variety of expressions than all the rest of the jury put

together. He might be all right on cross-examination, but how would he be on the direct? Through his distorted vision all the angles of light are perverted, or even obliterated. Most people with normal eyes can cross them, and the vision becomes both painful and confusing. I will ask the Court to just try it for a moment, and look at me, and see if I don't appear crooked?"

"Well," said the Judge; "that is apparent enough without turning this court into a spectacle shop. However, this is rather a novel question, and I will not pass on it until the incoming of the court at one o'clock, and the jury may be discharged until that time, as I understand from the clerk that several parties desire to take out their final citizenship papers."

Most of the people left the court-room, while those desiring their final papers, and their witnesses, clustered around the clerk's desk. The ceremony of transferring allegiance from foreign powers and potentates to that of Uncle Sam is certainly very imposing and impressive. The candidates and their supporters are all sworn, and a few questions are rattled off to them about being "attached to the principles of the Constitution of the United States, well disposed to the good order and happiness of the same, of good moral character, a resident of the United States for five years, and of the State one year, etc.," all of which they generally know as much about as if interrogated regarding the realm of the Mikado, and for aught they usually know, could have been just as easily manufactured into Japs as into free and enlightened citizens of the United States. This is usually followed with a short address by the Judge, congratulating them on their intelligence, the purity of their motives, and their evident desire to free themselves from the tyranny and oppression of their native countries. Had their real reasons been given, it would doubtless have been that they desired to vote, and hold office, and take up a homestead or tree claim, and after making some money here to go back to the old country to live free from military duty. This is not true of all, however, as many are sincere in their declarations.

Among the number naturalized was one of the jury by the name of Ole Olson, but this fact escaped the Judge's attention.

In the meantime the cross-eyed juryman was full of tribulation. He was aware that he was the subject of discussion, and it was so full of terrors to him that he was in doubt as to just what offense he had been guilty of. To make it worse, some of the other jurymen guyed him until he became frantic as well as demoralized. It was

suggested as the only escape that he go and get his eyes straightened. He caught at this eagerly, and went to Payne, the oculist, and requested him without delay to operate on his eyes. This was soon done, and with a bandage shading his eyes, he got back to the court-room just as the jury was called to the box. As soon as order was observed the Court announced:

"During the noon hour I have carefully considered the challenge which was interposed to Juror Seymour, and I must say there is great force in the objection urged. It is the duty of jurors not only to listen closely, and weigh carefully the evidence given by each witness on the stand, but also to closely scan his demeanor, his manner of testifying, and especially to note the expressions of his countenance, to the end that they may determine just what weight should be given the evidence. Anything that impairs or prevents a juror from so doing, just to that extent disqualifies him as a juror. It is plainly apparent that this juror, by no act or premeditation of his own — so far as the court is advised — is deplorably afflicted, and the Court will take judicial notice of the fact that obliquity of vision necessarily results therefrom, and that objects which are plainly apparent to ordinary vision, become to him confused and perplexing, constantly shifting and changing, conveying thereby false, delusive and deceptive impressions, all of which is plainly observable by a casual inspection of the juror."

With this the Judge turned to the jury and continued:

"Mr. Seymour, stand up, and ——"

"What have you got your eyes covered for? Remove the bandage, sir!"

The juror did as directed, and presented a most astonishing appearance. His eyes were red, swollen and bloodshot; they rolled and flickered like those of a new-born baby, and finally, after a vain struggle to control them, they settled down and turned half over, facing outwards. The Judge gazed at him in petrified astonishment and amazement for a moment, and then thundered forth:

"What do you mean, sir, by such actions? Are you trying to impose on the court?"

Galvanized into life for a moment, the juror struggled and gasped for breath, while his eyes rotated in a most astonishing manner.

"I thought, your honor ——"

"Silence, sir! The Court don't care what you thought. When you presented yourself this morning your eyes were crossed; they toed in; were pigeon-toed, in fact; now you are rolling them like

a couple of flutter wheels. You are guilty of contempt of court, committed purposely and feloniously, in the very presence of the Court, and I sentence you to jail for ten days. Sheriff, remove the prisoner."

Without more ado he was hustled off, and after quiet was restored the Judge continued:

"The fact that this juror, as just now discovered, has the extraordinary power of dislocating his eyes does not affect or change my ruling; let it be entered *nunc pro tunc* that the challenge to Juror Seymour is allowed by reason of being subject to permanent and incurable strabismus.

Soon afterwards the juror, Ole Olson, was examined. He was asked if he was a citizen. He said he was.

"Have you taken out final papers?"

"Ay got mae letst peper to-day."

"How was that? Why didn't you take them out sooner?"

"Val, de klerk faler tal if ay vil vote for hem naxt letson tame ha vil inta yarge ingentang for pepers; ef ay don't et vil kosta mae tra dolors. Ay tank des ban hal bully kontrak."

This seemed to paralyze the clerk, but before he could speak the attorney said:

"Your honor, I challenge this juror upon the ground that he is disqualified."

Then there was another long wrangle. One side said Ole should not have been summoned as a juror, because not a citizen, and that the oath taken by him while he was disqualified was not binding. In fact it was just as though a stranger had just stepped in the box when the regular panel was not exhausted.

The other side contended that prior proceedings were not void, but voidable only, and as the juror was now competent, all objections were removed. The attorneys didn't seem able to agree on the law or anything else, so the Judge again took a hand in. He said the law contemplated the selection of lawful jurors. They must be male resident citizens, over twenty-one years of age, and not over sixty, though the age limit was one which only the juror himself could urge; that he must be of sound mind, and free from disqualifying bodily infirmities. In the case at bar, Olson was not legally qualified when sworn on his *voir dire*, but had now become fully qualified; that an inspection of the record when he was naturalized, as well as the recollections of the Court, show that more than five years had elapsed since he took out his first papers — indeed, it was

nearly seven years; that Olson was *entitled* to his final papers fully two years ago, and that *equitably* he was a citizen during that period. The final papers are but evidence of his *legal* title to citizenship, and that the *legal* and *equitable* titles are now joined in the same person, and that for the purpose of this case the legal right dates back to the inception of the equitable right; and consequently he was and is a lawful juror. In other words, a present qualification is entitled to greater weight than an antecedent disqualification."

Finally every juryman was asked if he would believe the evidence of a dead man when it was given orally in court. Most of them said they wouldn't, though one or two thought they would consider it provided the man had been dead long enough so he could not be successfully impeached. And so it went on for at least a couple of hours, and then they had the jury stand up and be sworn again. The jury had evidently lied so much that the first oath had become exhausted; after that they swore the jury regularly every two hours.

Finally they got down to business and let the jury go to sleep. Then one of the lawyers asked for an adjournment until next day, so as to prepare for trial. He said it was a very important case, and he had been so crowded with other cases that he really did not feel like plunging into this one without a little preliminary preparation; and besides, one of his most important witnesses was not yet in from his ranch. But the Judge got mad, and said he was not going to keep the jury and witnesses waiting at a big expense to the county just because the lawyers weren't ready. He had come here to hold court, and if parties were not ready they must take the consequences, as he should feel it his duty to adjourn court and stop piling up expense for nothing. The taxes were high enough even with the strictest economy, and every moment must be improved, even to the holding of evening sessions; and then the Judge pulled his side whiskers, beamed benignantly at the mossback voters on the back seats, and sternly at the lawyers within the bar. The voters thereupon were filled with admiration of the Judge and indignation toward the lazy lawyers, and expressed the same with sundry looks, and nods, and whispers, and shuffling of feet, but this was finally turned to awe when the bailiff, being urged thereto by the Judge, rapped sharply on the desk and shouted: "Order in court; order in court." The Judge finally said that he would let the case go over until morning, but at that time parties must be ready promptly, and the case would go on, witnesses or no witnesses.

The Judge was evidently worried over the expenses of court and

the financial condition of the county, though he tried to appear natural, and not to show his uneasiness, as he shortly joined a select party of friends in a quiet game of "draw" during the rest of the day and evening; and one of the lawyers who had incurred the Judge's displeasure in asking for the adjournment was one of the same party. It looked a little queer to me, but "some pork will boil that way."

CHAPTER VII.

THE TRIAL CONTINUED.

"Mr. Scott, you may take the witness stand."

I advanced to the witness chair and held up my right hand, when the other side again interrupted.

"Your honor, we object to this person being sworn, and to any testimony on his part."

"What is the ground of your objection?"

"Principally upon the ground that he is dead, at least legally dead, and is not a competent witness. We have set up by way of defense the proceedings in the Probate Court. Those proceedings cannot be denied. The finding of that Court was that 'Moses Scott was dead to all legal intents and purposes.' Now, I ask the Court this question: Is a dead man a competent witness? In my search of that branch of the law I am utterly unable to find any precedent or authority which would justify your honor in permitting a confessedly dead man, dead by the record, 'dead to all legal intents and purposes,' to be sworn and testify. Wherein can he be bound by an oath? What pains of penalties can be visited upon him if he swear falsely? Suppose we wanted to impeach him; how can we summons the spirits of the unknown world, of the vasty deep, those with whom he has associated for the past seven years, and compel their attendance? Will process of this court reach to Heaven or Hades, and compel the attendance here of the denizens of those worlds? Who can serve the subpœnas, and must we tender fees, mileage each way at ten cents per mile, with two dollars for one day's attendance? Suppose the sheriff were to politely introduce a subpœna to the notice of the angel Gabriel; is it likely that he would obey it? Suppose he were to attempt to serve it on Satan or one of his subjects; is it not to be apprehended that the paper would crumble to cinders in his fingers, and the seal of the court consumed in sulphurous flames? And yet, if Moses Scott is permitted to tes-

tify we are entitled to, and must have, some of the witnesses in order to impeach his reputation for truth and veracity. Your honor well knows the rule; we must call witnesses who reside in his neighborhood, in his immediate vicinity, who alone can testify to his public reputation in this regard. Why, sir, it would bankrupt my client to pay mileage alone of the witnesses. He couldn't do it. It would be denial of justice. It would be not simply a hardship, but an utter impossibility. Suppose your honor permits this object to be sworn; we must immediately ask for subpœnas and send the sheriff out after these witnesses. Just when we are liable to need them most, more than likely we would get word that the sheriff had been wrecked or mobbed in Hades, or that St. Peter refused to let him in, or that he had got tangled up in the tail of a comet, or some other catastrophe. Are the interests of my client to be jeopardized by the obduracy of St. Peter, or the well-known cussedness of the Devil? Must my client lose his ranch, upon which he has toiled long years, and opened several acres to cultivation, upon which there is now growing the succulent cabbage, the ripening melon and the barbed gooseberry, just because a comet runs away with the sheriff and the original subpœnas? Will your honor compel my client to sacrifice his rural abode, around which cluster pleasant memories and mules, some of which are covered by chattel mortgage, and he and his weeping wife and children be thereby compelled to wend their way, and wear out their shoes, 'over the hill to the poor-house,' in order to raise money to pay mileage and witness fees, made necessary in defending the title to his ranch thus ruined and sacrificed? Pardon me if in my zeal I become too earnest in this cause. Nor think for one moment that the dire results of your honor's ruling as I have endeavored to portray them are but flitting and unsubstantial children of a disordered brain. A thousand times, no. They are real, vivid and impending; they confront us on the threshold of this case. In the second place, I invoke the application of *res adjudicata* and *stare decisis*. The man is dead. It was so adjudicated in the Probate Court, and that is decisive in this; in fact, when he attempts to fly in the face of that finding he is guilty of contempt of court. *Fiat justitia ruat cœlum.*

"Another principle I contend for, and it is this: The judgment of the Probate Court is not subject to collateral attack. If the party desires to avoid the effect of that judgment which declared Moses Scott dead, let him proceed directly by an appropriate action to annul that decree, and when annulled, and the dead resurrected,

perhaps the party may have a standing in court, such as sought in the present action.

"The presumption of death after seven years' absence, upon which the Probate Court acted, is allied to the statute of limitations, which is a statute of repose. The dead ought to repose in their graves, and not come back here and unsettle titles, provoke litigation and disturb vested rights. Once admit that this may be done, open the doors of this court to every dissatisfied, disembodied spirit, and who can sleep with any sense or feeling of security as to his real possessions? It would be a dangerous precedent. Once dead, always dead, should be our motto; and if the courts have not the power to enforce this principle, then we must resort to the legislature to enact a law to the effect that death, whether voluntary or involuntary, willingly or unwillingly, by operation of law or of nature, shall immediately, instantly and irrevocably divest the deceased of all his estate, both real and personal.

"I go one step further, and assert that when administration is had on the estate of a living person, based on the presumption of death after an unexplained absence of seven years or more, such administration in all its branches and operations is valid. The reason for it is this: Property is for use, not idleness; for trade, improvement, enjoyment, and all that contributes to the activities of business. Any act which impedes, clogs or retards business is in conflict with the laws of trade, is in restraint of trade. More legislative acts are held unconstitutional as being in restraint of trade than from any other cause. Has a single individual greater power than a legislative body? The moment Moses Scott abandoned this property, that moment he acted in restraint of trade, and his estate became subject to administration. An act that is lawful for one is lawful for all. Now, suppose that all the people on the face of the earth were suddenly to disappear, as he did, and wilfully abandon their property for seven years, what would be the result? Why, all business would cease, trade would be ruined, and unusual chaos result. If such an insane event were to occur, the rest of the people would be justified in applying for letters of administration upon their entire estate. By this method, and this only, could universal disaster be averted. True, the evils resulting from the act of one would not be so great as that of all; but the principle I am contending for would be the same, and the same remedy should be applied.

"Moses Scott is dead; let him so remain. His estate has been administered upon; let it not be disturbed. This principle was

recognized and in all respects upheld by the Court of Appeals of the State of New York. I refer to the case of Martha D. Roderigas, administratrix, v. East River Savings Institution. I find it reported in the 15th American Law Register, page 205; also in 63d N. Y., page 460. One James Divine deposited $485 in the bank in 1857, and then disappeared. He was last heard of in Havana. In 1869 one Mrs. McNiel was appointed administratrix, who demanded and recovered from the bank the money deposited by Divine, together with accumulated interest. In 1871 Martha D. Roderigas, on petition showing Divine's death to have occurred after 1869, was appointed administratrix, and *she* demanded the money from the bank. It was refused. She brought suit, and the bank pleaded payment to first administratrix. The Court of Appeals decided that the administration on Divine's estate made while he was living was valid. That case was on all fours with the case at bar, and is the only case of the kind ever decided by a court of last resort in the United States.

"The field is broad, and I have but indicated a few of the dangers and difficulties which will confront the court by permitting the veil to be rent in twain which separates time from eternity. We ask the court in all confidence to exclude not only this witness, but all other witnesses around whose garments cling the odors of the grave. Once, your honor, while resting from exhausting labors in my profession, I beguiled the dragging moments by exercising my literary abilities. The divine afflatus enveloped me, and in my exalted state I dashed off a few of the thronging thoughts which crowded for utterance. I then classed the effort as literary; I now see it was law. It is applicable to this case. Permit me to quote it:

"'Prithee! Look! Behold! Time was that when a man's brains even knocked out sufficiently the man was liable to shuffle off the mortal coil and render unto Cæsar that which cannot enrich him, and there the end; but now, with twenty mortal murders on his crown, he comes back and feeds our monuments to the Maws of Kites. Can these things be, and overcome us like a Puget Sound fog, without our special retainer? Or crook the pregnant hinges of the knee, while the seas of Budd's Inlet flow one red incarnadine? Humanity stands appalled at the frightful spectacle, with each particular hair on end like forks upon the quillful fretupine.'"

This outburst of eloquence was succeeded by a moment of tragic silence, the speaker standing with arms outstretched, his eyes glued on vacancy. Slowly, but impressively, he came back to life, and

sank into a chair with the consciousness of one who has made the effort of his life.

CHAPTER VIII.

THE REPLY.

Although conscious that I had committed no wrong, and was simply seeking my legal rights in a legitimate and lawful manner, I confess I was amazed and thunderstruck at the assertions made by the attorney. I had no fear that my word or record could be impeached by witnesses called from terrestrial or celestial sources. Indeed, in the latter world I had been treated in a very gentlemanly and honorable manner by all with whom I came in contact, and I had reason to believe that this treatment was founded in some degree upon like actions and conduct on my part. I had not associated with Satan nor any of his alleged retainers; in fact, had never met him or them. My primary object in returning had been to prevent a wrong which I feared might be done to some one charged with having been unlawfully the cause of my departure from earth. Finding, however, to my great relief, that my fears were unfounded, and that a wrong might be consummated against my estate, I was simply devoting my energies to defeat the same. Surely the law, which I had looked upon as the embodiment of wisdom and justice, would aid me in this laudable undertaking. Imagine my surprise, then, at the imputations cast upon my character and motives.

The Judge seemed deeply impressed, and gazed at me somewhat askant. However, my attorney arose and asked the Court whether he cared to hear argument in opposition to the flimsy objection interposed and the utterly irrelevant rhodomontade in which opposite counsel had indulged. The Judge remarked, somewhat curtly, "I will hear you."

"I had hoped," said he, in reply to the Judge, "that your honor had clearly detected the unwarranted assumptions and fallacious so-called arguments in support of his objection, and I feel it but a waste of time on my part for me to follow him into the fields of imagination, nay, hallucination, for the purpose of putting to rest the disquieted spirits which have been conjured into existence by his disordered brain and shattered intellect. Who can minister to a mind diseased, and how can sound, legal or logical argument be used to dispel the noisome vapors which seem to emanate so naturally from the counsel representing the defendant? He invokes the

presence of the saints long laid to rest; would summons the spirits of the vasty deep, and even call to his aid his satanic majesty, backed by all the condemned spirits who have inhabited his dread abode for the period from whence the mind of man runneth not to the contrary. My client stands as high above such abominations as are the triple peaks of Mt. Rainier above the slimy reptiles which people the pestilential swamps of the Puyallup River.

"Why, sir, he invokes the aid of the principle which he calls *res adjudicata*. Let me warn him against using such low and disgraceful language in a temple of justice. Rendered into the English language, what does *res adjudicata* signify? Sir, it is a Chinook phrase, descriptive of all that is offensive, ill-smelling and odorous. Literally, it means a dead dog salmon, which can best be handled on the tines of a long-handled fork, and is used only as an objectionable fertilizer. And yet, sir, he has the effrontery to come into this court pattering his Chinook lingo, and endeavoring to impose it upon your honor as a sacred principle of law, in order to defeat the ends of justice. *Stare decisis* is of like origin. It was the dog feast of the Siwash; it was the chief dish of the tribal potlatch when they gathered on the shores of Puget Sound hundreds of years ago.

"It is urged that the decree of the Probate Court, which rashly, and without anything to support it, found that my client came to his death in 1888, cannot now be contradicted, but must stand in law and in fact as true. Was Moses Scott present at the time that decree was entered? No. Was he dead? No. Then if he was not present, or dead, how could the Court acquire jurisdiction over his estate? Is any question raised as to his identity? None whatever. Can a man die by decree of Court in a civil action, or be brought to life by a judicial declaration? Can this court, or any other court, reverse the laws of nature; or, if it attempts to do so, can such action have any life or vitality? And yet, sir, that is just what necessarily and logically follows in case your honor sustains this objection.

"In offering Moses Scott as a witness I do not bind myself to make any proof as to his existence or place of abode during the past ten years. That he originally owned this property is admitted. That he has disposed of it is not urged. That he is now alive and in court is all I assert, or expect to prove, and it necessarily follows that he is entitled to recover. If he was dead, and that fact is now rendered material, the burden of proving the same, and showing its materiality, rests on the defense. I do most strenuously contend

that death does not divest a man of his legal rights, and if he sees fit to return and claim them, no court can lawfully obstruct him. I challenge the production of any authority which says a dead man has no rights. He is not divested either by the common law or statute. Some States have endeavored to confiscate property by legislative enactment, to the effect that upon the death of a person his estate should immediately descend to and vest in his heirs or devisees. We have no such law, and if we had it would be unconstitutional. I know it is often urged that the legal title to property must always vest in some one, *in esse*, and that when a person is divested of title by his own act. or by operation of law, it must immediately vest in some one else. This, your honor, is not true in fact or in law. Take it in the State of Washington. Our Supreme Court have decided that at death the legal title passes to the administrator; but who has the legal title during the interim which always exists between death and the appointment of the administrator? Sir, it is in the dead man. Suppose he comes to life before the administrator is appointed or qualified, and months and years often elapse in many cases, will any sane man dare assert that he could not exercise acts of ownership to the fullest extent over his own property? The most that can be said is that the title is in a state of suspended animation; suspended until the dead man, if he sees fit, resumes it again. Upon this latter proposition I have an authority directly in point from the highest judicial tribunal in the United States — I mean the Supreme Court. Let me read it, sir, and forever silence those who would attempt to take a dishonorable advantage of a man while he might be temporarily absent on a celestial exploring expedition. It is found in the 133 U. S. Supreme Court Reports, page 92:

"'It is not necessary to be over-curious about the intermediate state in which the disembodied shade of naked ownership may have wandered during the period of its ambiguous existence.' And later on in the decision the Court say: 'It remained as before stated, a mere dead estate or in a condition of suspended animation.'

"This decision was quoted with approval in Jenkins v. Collard, 145 U. S., page 812.

"Now, let us apply these clearly enunciated principles to the case at bar.

"The Court clearly recognizes such a thing as a 'dead estate,' and it stands to reason that only a *dead man* can be vested of a *dead estate*. Can a 'dead estate' vest in a live man? The Supreme

Court of the United States says it cannot. Not only must the estate be dead, but the man must be dead also, before there can be a union of the two. Now, conceding for the purpose of argument that Moses Scott died as declared by the Probate Court, at the same moment his estate died also; so that while living he had a 'live estate,' and when dead he had a 'dead estate.' Upon his resurrection, and not before, his estate is resurrected also. There has never been a moment when he was not the owner in fee of the property in controversy. Mark well the language of the Court; it is not only referred to as a 'shade of naked ownership,' but is especially declared to be the *disembodied* shade of naked ownership, and we are expressly cautioned against being over-curious about the 'intermediate state in which it may have wandered during the period of its ambiguous existence.'

"I recognize the fact that the Court was somewhat unfortunate in the use of the words, 'ambiguous existence,' for it would seem to follow that the Court doubted the 'existence' of the title, which immediately preceding it had so aptly described and clearly distinguished. The qualifying word 'ambiguous,' as applied to the word 'existence,' evidently refers to the ambiguity which theretofore existed in the minds of other courts and law writers who were unable to grasp the great principles thus, for the first time, so clearly outlined and illustrated.

"Reference has been made to the case of Martha D. Roderigas, administratrix, v. East River Savings Institution, which, it is claimed, supports opposite contention. I will clearly show your honor how it cannot apply. The facts are these: The East River Savings Institution, like all other banking institutions, desired, above every other consideration, to be honest and carefully protect its depositors. It had on hand, in 1869, $485.00 principal and considerable amount of interest thereon, which had been deposited by James Divine in 1857. The bank contemplated an involuntary assignment, in fact, had everything all ready for that purpose. The only thing which stood in the way was this deposit. They couldn't find Divine, so the officers went in a body to Mrs. McNeil, the administratrix, and tendered her the money. She refused it. They begged and implored her to take it, explaining that they could not proceed with the assignment until every honest debt was paid. Finally, in order to accommodate them, she somewhat reluctantly received the money. These were the true facts in the case, which were disclosed in confidence to the Court of Appeals in New York

just after the decision was given. Mr. Justice Earl, who wrote the opinion, regretted to his dying day that the record failed to disclose the real facts. Had it done so, the decision would have been the other way. The bank, *in form*, defended the suit, but it was really anxious, when it learned that Divine was alive, to pay the principal and interest a second time, saying that the reputation of the bank was of more value than the paltry $485 and accumulated interest. The bank was keenly disappointed at the result, and attempted to appeal to the Supreme Court of the United States, but that Court, while expressing its sympathy and desire to aid the bank, was obliged to dismiss the appeal, and forego a consideration of the case on its merits, simply because the amount involved did not confer jurisdiction, no federal question being involved.

" In conclusion, I desire to say that I have paid but little attention to the poor logic, bad Latin and worse law which has been hurled at us from the other side. Sincerely desiring to aid the Court in the consideration of this question, I have avoided all personal allusions, kept strictly within the facts, and irresistibly fortified my position with unanswerable authorities. I confidently ask your honor to ' let the galled jade wince, our withers are unwrung,' and overrule this objection."

I confess that I was not a little dubious in my own mind as to the result of this argument. To be honest, I didn't understand it, and therefore couldn't make any application of it. As quickly as opportunity presented I called my attorney's attention to the fact that at one time in his argument he asserted that I was not dead at the time the Probate Court said I was, while afterwards he had admitted I was dead, and that I took the title of the property with me. He explained that he had two theories; one was that I was dead, and one that I wasn't, and that we could win on either; that whichever one the Judge might take, he had pumped him so full of law that he was bound to hold with us; but in case he took the bits in his teeth and ran away on some fool theory of his own, the record was all right for reversal in the Supreme Court.

At the conclusion of the argument the Judge remarked that this was a very grave question, and his decision might be decisive of the entire case; that he wanted to look over the authorities cited very carefully, and it would be for the benefit of all, and save expense, to take a little time before announcing a decision. He would therefore adjourn court until the following morning.

On our way out of the court-room I asked my attorney as to the

prospects. He replied: "I have set the Judge to studying. Those authorities I fired at him are a winner. It was easy to be seen by his rulings in making up the jury that he was dead against us; but he hates like the old Nick to get reversed, and if I can keep the fear of the Supreme Court dangling before his eyes, we are sure to win. Oh, I tell you, an attorney has to work. He has to keep watch of the Judge and the jury, and even take into consideration the audience, for lots of times I have known verdicts to be substantially made up and dictated by the back seats. In addition to this, he has to keep track of the witnesses and the evidence, besides watching the opposite side to see that they don't put up any job on him. I tell you, an attorney has got to have eyes in the back of his head and think of a dozen things at the same time when he is trying a lawsuit. And even then clients don't half appreciate what is done, nor stop to think of the authorities he has to consult, or of the sleepless nights which he spends in devising ways and means of protecting their interests. It is a regular dog's life, and sometimes, when the Judge and jury go dead against me, when I know I am right, I get disgusted enough to quit the practice altogether."

CHAPTER IX.

THE RULING.

After the opening of court the next morning, and the transaction of some preliminary business, the Judge said:

"On yesterday, after empaneling the jury, the plaintiff was called as a witness on his own behalf. The defendant's counsel objected to his being sworn, and also to any testimony which he might give, the principal ground being that the proposed witness was dead, or had been declared dead to all legal intents and purposes by a court of competent jurisdiction, which finding and decree had not been modified, reversed or set aside, and was and is in full force and effect.

"In considering this question, it is first necessary to refer to the pleadings in this case, in order to determine precisely what the issues are, as bearing upon the offer made of the plaintiff as a witness, and the objection interposed by defendant. This is an ordinary action in ejectment to recover possession of certain real estate, plaintiff alleging ownership in fee, right of possession, and that defendant unlawfully refuses to surrender the same. Defendant answers,

denying ownership of plaintiff, and justifies his possession by alleging ownership in himself. He pleads the action of the Probate Court, wherein it was decreed that Moses Scott was dead, and the further proceedings therein, whereby the property in controversy was sold by the administrator, and finally title was passed to him.

" Plaintiff replies, admitting the proceedings of the Probate Court, attacks its regularity, and alleges a total want of jurisdiction by reason of the fact that Moses Scott, plaintiff herein, was not in fact dead when so decreed to be by the Court.

" If the objection had been directed solely to his being sworn as a witness I should have no hesitancy in overruling it; for when a witness is presented, whether alive or dead, having the semblance of being alive, so far as ordinary observation is concerned, he should certainly be permitted to qualify in form at least, leaving the actual fact as to his being alive or dead to be determined by the jury from subsequent examination, or other competent evidence. The Court would not be justified in thus usurping the province of the jury, as under our practice juries are the sole judges of the facts. The further objection urged by counsel is that the witness should not be permitted to testify at all. For the purposes of this case, I will assume that the witness was sworn, and a material inquiry propounded to him, to which the defendant interposed the objection stated.

" Before passing directly upon the main question, the Court will notice some consequences which, it is alleged by counsel, will necessarily follow should the objection be overruled. Intimation is made that the defense might desire to impeach the reputation of the plaintiff for truth and veracity, which would necessitate the summoning of witnesses who were acquainted with his public reputation in that regard, in the immediate vicinity in which he resided. This is undoubtedly the rule; but the defense say that by reason of the great expense necessarily incurred in tendering mileage to witnesses coming from such remote distances, they ought not to be put to such expense. The Court is unable to agree with counsel in this regard, and it is for them to say whether or not they will incur this expense, or take their chances on the trial without such desired witnesses. It is also suggested that process of the Court might not be obeyed, and that the seal and other evidences of authority might be cremated or incinerated. The Court desires to say right here and now, that if it is brought to the attention of this Court that any of its process has been cremated or incinerated by saints or sinners, living or dead,

and especially by any resident high or low of the Infernal Regions, they will be immediately brought before the bar of this Court and punished for contempt of court, and the punishment will include imprisonment in addition to a heavy fine. This, I trust, will sufficiently dispel the fears of counsel in that regard."

As he uttered this, the Judge, as I thought, breathed somewhat hurriedly, an involuntary shudder seemed to pass over him, and he looked nervously about, as if he were endeavoring to dispel his own fears, as well as of those to whom he addressed his remarks. Pulling himself together, he continued:

"It is further claimed that the judgment of the Probate Court cannot be collaterally attacked, and the principles of *res adjudicata* and *stare decisis* are urged in support of the same. This necessitates a legal definition of the two phrases, involving a history of their origin. On the one hand they are claimed to be law phrases, signifying, in brief, that the several matters, as well as the law of the case, have been once litigated and determined, and cannot be again litigated or questioned in this action. On the other hand it is contended with much force that *res adjudicata* and *stare decisis* were originally Chinook, signifying, respectively, a 'dead dog salmon' and 'dog feast,' from which it follows naturally, if the latter contention be correct, that defendant literally invokes the principles of 'dead dog salmon' and 'dog feast.' Manifestly, this would be absurd, and the application would be of no legal value, except in a Chinook court. The Court is aware, as a matter of information, that the Chinook language, or, rather, dialect, is one of comparatively modern origin. It was made or created here on the Sound, as a common means of communication between the several Indian tribes of diverse languages and the white people. The Chinook words had no meaning save such as were given them by their creators. It was a successful creation and adoption of a language, such as has been more recently proposed by advanced thinkers and scientific philologists and dialecticians, known as the Volapuk. And while the Chinook may be humorously described as a cross between two coughs and a spit, nevertheless it is a live language, and has been since its creation, in about the year A. D. 1845. The phrases, '*res adjudicata*' and '*stare decisis*,' are certainly found in the Chinook language, the translation or signification being as before stated. The question is, Were these phrases borrowed from the law Latin, or the law Latin from the Chinook? Celebrated linguists inform us that live languages often borrow from dead ones,

while the latter remain inert, show no growth and gradually fall into decay. This would seem to indicate a Latin origin, and would prove the decisive element in the mind of the Court were it not that the Court is also aware of the fact that the use of the phrases in the profession and by legal writers of law Latin has been also limited to about the same period, and that prior to 1845 such phrases were unknown to the law. Another phase not presented by counsel suggests itself to the Court, and that is this: Where the same phrase or sentence is found at the same time, in languages both dead and alive, having, as in the present instance, a meaning not only divergent, but totally irreconcilable, it would be safer for the Court to adopt the modern definition rather than wander and grope amid the dim aisles of the past, or become lost in the centuries of past oblivion. The view which the Court takes of this whole matter, however, is such that it is not necessary to decide this interesting but perplexing question, and I will pass on to consider the other matters involved.

" Reference has been made to the Roderigas case, and counsel has given a very interesting account of what he deems the facts in the case, which were unknown to, and caused to be misled thereby, Mr. Justice Earl, who wrote the opinion. An examination of that case shows that it was first argued and submitted to six judges, and these being equally divided, it was again argued before a full court. Justice Earl being the seventh judge, of course the sole decision rested with him. Now it so happened (and this was the reason why he did not sit in the first instance) that his Uncle John Oysterbanks, a wealthy and aged member of Tammany, and from whom he was in lively expectation of inheriting, had signed the bond of Mrs. Isabella McNiel, the first administratrix, to whom the bank paid the money. In case it had been decided that the first administration was void, by reason of the fact that Divine was alive, and that the second administratrix, Martha D. Roderegas, could recover, thereby compelling the bank to pay the money a second time, the bank could have turned round and recovered the amount from Mrs. McNeil and her bondsmen. Mrs. McNeil, in the meantime, had died, and left no estate, and the only other bondsman was a professional, consequently it would have to be recovered, if at all, from his uncle.

" The old gentleman told him that if he saddled that McNeil bond onto him, he might as well pay it himself, as he should not only take it out of his inheritance, but might cut him off altogether; that when he had a chance to be thrifty and turn an honest penny he ought to

do it, rather than fritter away his money on some aborigine from Cuba.

"It will be readily seen that the force of the opinion thus rendered was greatly shattered, and so far as the New York Court of Appeals show, Justice Earl was never thereafter, while on the bench, permitted to render a similar opinion. I shall, therefore, disregard this case, as I should not feel justified in being governed by his opinion unless similarly situated.

"Although this is an action at law, still the question presented to the Court not only invites, but requires, the Court to review it from an equitable standpoint. It has been suggested that the offer, made deliberately, of a disqualified witness, that is, of a person who has been adjudged dead, is a contempt of court, an attempted imposition upon the Court. I quite agree with counsel in this regard, but inasmuch as the fact of death is put in issue by the pleadings, the Court would hardly be justified, at this stage of the case, in assuming such death and acting upon such assumption. However, should it appear hereafter that such is the fact, the witness so offered, and those who knowingly and wilfully present him, will be surely dealt with. No dead man shall be permitted to appear in person and give evidence in this court, except on stipulation of both parties, allowing an equal number of defunct witnesses on either side, including the right of the defendant herein to so testify in case of his death pending proceedings herein.

"Another reason which moves the Court to take this view of this branch of the case is this: It is admitted that, by decree of the Probate Court, Moses Scott was found dead 'to all legal intents and purposes.' To that extent I am inclined to go; but there may be a residuum of life still existing, exterior to and beyond the adjudicated record. How much there is of this residuum, and what its standing in court, should be a matter of careful consideration. His rights as a possible residuary legatee or residuary litigant herein cannot be abridged, and in the further consideration of this case I shall confine the evidence to plaintiff's rights, if any, based upon, and in support of, any residuum of life which may be found to exist independent of, and not in conflict with, said decree. The proof upon this point must be clear and convincing. Grave doubt exists in the mind of the Court as to whether or not, in construing this decree, I should give the same effect to it as would naturally be given were the words, 'to all legal intents and purposes,' omitted, leaving it a finding of death without limitations. But I take it, in

construing this decree I must be governed by the same rules which apply to the construction of a contract or statute, and that is to give life and vitality, if possible, to every word and phrase; and although it might be forcibly urged that every fact which might have been found in that proceeding was necessarily litigated and determined therein, and therefore not a subject of subsequent judicial investigation, nevertheless the guarded expression of that decree, the express limitation attached to the finding of death, raises a strong presumption in my mind that the court fully understood its business, and that the decree, as we find it, expresses the exact intention of the Court. Moses Scott is certainly dead ' to all *legal intents and purposes*,' but may be alive as to *other intents and purposes*. Whether or not his present proceeding shall be governed by the former or the latter will be determined by subsequent proof. My present impression is that the decree of ' dead to all legal intents and purposes ' governs this case. He who seeks equity must do equity, and that which ought to have been done equity will presume to have been done. By reason of the respect due the decree of the Court, Moses Scott ought to be dead; it logically follows, under the above rule, that he is dead, subject, however, only to the limitations contained in the decree.

" Nor am I wanting for precedent or authority in thus recognizing and carefully providing for this residuum and its attendant rights. The case cited by counsel from the United States Supreme Court in recognition of a dead estate, or one in a state of suspended animation, is clearly in point; but another not cited appeals to me with greater force. Upon the death of the Hon. Thaddeus Stevens, familiarly known as the ' Great Commoner,' his body was taken to his home in Lancaster, Pennsylvania. Two days after death, and while his body was lying in state, the Republican Congressional Convention, in session but two blocks away, and fully aware of his demise, unanimously renominated him for congress. He made no formal acceptance of the nomination, and the convention reluctantly felt compelled to name another candidate. Had he accepted the nomination and been elected, is it conceivable that Congress would have refused to permit him to be sworn and take his seat? In these days of political strife, if a dead congressman possesses life enough to win a renomination, certainly the courts ought to recognize a contingent existence of one whose death is founded upon a decree containing express limitations. The citation above referred to will

be found in Cooper's American Politics, page 135, and is certified by Col. A. K. McClure.

"As bearing upon this subject, I will also refer counsel to a celebrated English decision, that of Reg. v. Stewart, 12 A. & M., pp. 773, 779. In a very elaborate decision the 'rights' of a dead body are discussed and expressly recognized. This case was much criticised, however, in Queen v. Prince, in the High Court of Justice, Queen's Bench Division, by Lord Stephens, saying *inter alia*, 'the Court speaks of the rights of a dead body, which is obviously a popular expression, a corpse not being capable of rights.' Still further along in the opinion he says the 'attention of neither court was called to the subject of anatomy;' hence it is fair to presume that even Lord Stephens recognized the rights of a dead person from an anatomical point of observation.

"I have thus gone into this question at considerable length, so that counsel might know the views of the Court, and to what extent and for what purposes evidence will be admitted.

"Within the limitations before given the objection is overruled."

CHAPTER X.

THE TRIAL RESUMED.

After the Judge had given his decision I was sworn and examined.

"You are the plaintiff in this action?"

"I am."

"Are you the same Moses Scott who formerly lived here, and who owned the property in controversy?"

"I am."

"Since that time have you ever, either by yourself, agent, trustee, heir, proxy, *cestui qui* trust, ambassador or attorney, voluntary or involuntary, either in law, equity or otherwise sold, transferred, assigned, leased, encumbered, clouded, eloigned, abridged, concealed, destroyed, eliminated, transported, or done any other act affecting the title to the property, or any of its rents, issues, profits, emblements, hereditaments or appurtenances, corporeal or incorporeal, in any way, manner or form, or in any wise thereunto appertaining?"

"Which?"

"Your honor," said opposite counsel, "we object to the question, first, as leading and suggestive; second, as incompetent, immaterial

and irrelevant; third, as contradictory, misleading and not in proper form."

The Court thereupon requested the reporter to read the question, which the latter attempted to do, but failed. The Court said he could not rule upon the question without knowing what it was, and asked counsel what he was trying to prove. Counsel replied that he was trying to prove that I had never disposed of the property.

"Why don't you ask him that question directly?" said the Judge.

"I did."

"Then why don't the witness answer it?"

"Because opposite counsel objected."

The Judge said he had not heard any such question asked, neither had the reporter any such question in his minutes. Finally the Judge inquired of me if any such question had been asked. I replied "No." The counsel insisted that if the reporter had taken down the question which he propounded, in which, for short, he had included every phase of possible alienation, the Court would find he was right. However, he would change the form of the question as suggested by the Court, and to avoid the objection interposed. He then asked if I was still the owner of the property. Before I could reply, opposite counsel again objected, saying the question called for a conclusion; that it was for the jury to decide whether I owned the property, or the defendant.

Then there was another long argument, and both sides read from some books which had been written by Mr. Greenleaf, and Mr. Phillips, and others, in which the positions of both sides were shown to be correct. The Judge said it was a very close question. The witness certainly ought to know, if any one did, whether or not he was the owner of the property. It sometimes happened, however, that a man thought he owned property when in fact he did not. The witness should state facts, not conclusions. He would therefore sustain the objection.

During this time I still sat in the witness chair listening intently to the proceedings, and at the announcement by the Judge of his ruling, my attorney turned toward me to continue the examination. He looked about in a somewhat bewildered way, remarking that the witness was there a second before, but seemed to have disappeared. The Judge and jury and others also looked about in blank astonishment. I spoke up to call their attention to me, but it didn't seen to have the least effect, as they evidently did not hear me. All at once it flashed over me that I had let the time go by in which

I was to take the Immortal Materializer, and that I had actually vanished from mortal sight. I had been economical in the use of it, desiring it to last until my suit was decided, and had evidently been careless as to the exact date when last taken. I passed unseen out of the main court-room, through the hall and into a room provided for witnesses. Here I took a swallow of the elixir of life, not desiring to be seen with a flask in my hand, and when I attempted to again pass through the door of the room, found it locked. I rapped loudly, which soon attracted the attention of the bailiff, who unlocked the door and stood with blanched face as I walked out. It seems he had locked the door but a moment before, and knew the room was empty. Giving him no heed, I pushed aside the baize doors to the court-room and passed within. My appearance created greater astonishment than my disappearance. However, I passed quietly to the witness chair, and calmly sat down. Although nothing was said, I could still discern a look of amazement on every one's face, and the Judge eyed me most ominously. In my own mind I determined to be more careful in the future, as I had evidently but just escaped disastrous consequences.

Then I was asked if I had ever sold or disposed of the property, to which I answered that

"I had."

With this the defendant's attorney moved for a nonsuit, upon the ground that, having no interest, I could not maintain the action. The Judge said he should grant the motion, and passed some not very complimentary remarks about bringing such a suit where the attorneys must have known no action would lie. My attorneys replied that they certainly understood from me that I was still the owner, and besides the record showed no conveyance. Finally I got leave to explain that I had once sold the ranch, but had to take it back under the mortgage, and that I had never sold it since.

My side of the case closed with my testimony, and the other side introduced the records of the Probate Court, the administrator's deed and deed to McNiel. Thereupon the defense moved the Court to instruct the jury to return a verdict for the defendant, and about the same arguments as were first had were again gone over. At the conclusion of the argument the Judge reviewed the whole case, and wound up by saying:

"The decree recites that Scott mysteriously disappeared in 1881, and had not, at date of decree, been heard from. Now, there are two classes of disappearances, voluntary and involuntary; in the

former the party is thereafter equitably responsible for the result of such act; in the latter he would not be. It is difficult to define the dividing line between the two, and each case must largely be determined by the particular circumstances surrounding it.

"Take it in the case where a man is working on a boom of logs, where the logs separate and the man disappears in the water, while the boom gently closes above him. Should he thereafter, within a reasonable time, appear, the act might fairly be classed as involuntary; but, on the contrary, should he fail or refuse to appear within a reasonable time, the disappearance ought to be classed as voluntary, that he has jumped the job, and therefore the acts of third parties regarding his estate, predicated upon such voluntary disappearance, ought to be upheld in law, and creates an estoppel *in pais* against the person, who, by his own act, has made possible, if not indeed invited, the act of such third parties.

"The facts surrounding Mr. Scott's disappearance, as recited in the decree, are very meagre, but it is strongly intimated that he was murdered, that is, ceased to exist, in 1881. Had the decree stopped there the solution would not be difficult; but it does not. On the contrary, it recites an unexplained absence of over seven years, and then finds that he came to his death to all legal intents and purposes in 1888. The alleged death by murder is not found in definite and uncertain terms, while the death by absence, which might have been absolute, also stops short of ultimate extinction; the decree recites a qualified death, one 'to all legal intents and purposes' only. Separately stated, absolute death cannot safely be predicated upon either finding; but putting the two together, the one fairly supplies what is lacking in the other, and I feel not only justified, but compelled, under the evidence, to hold that Mr. Scott is dead, and that he died not later than March 25, 1888.

"This is the view I am taking of the case. The Probate Court having passed upon the sufficiency of the petition to give it jurisdiction, and acting upon it in good faith, of course the finding that the party was dead, under the presumption that his own acts had caused to arise, he had remained away a sufficient time that the Probate Court said the law does presume he was dead. I therefore find, as a matter of fact, that he is dead."

Under the instructions of the Court, the jury returned a verdict for the defendant.

CHAPTER XI.

I AM STILL DEAD.

It is easy to be seen that I was in an unenviable position. When I sought to enforce my rights to my property it was denied, saying in so many words that I was dead, and a dead man had no rights or standing in court. Many of my acquaintances thought it a good joke on me, and treated me accordingly. Still, every man to whom I offered cash on a trade or purchase did not hesitate to accept the same. It finally culminated in many embarrassments. On one occasion I had hired a rig and driven out west of the city. On my return I had to cross the Fourth street bridge, something like a quarter of a mile long, in the middle of which is a draw to enable water crafts to pass. I was driving a very spirited animal, and just as I approached the draw a steam tug close by gave two or three unearthly screeches. My horse started like a rocket, and fairly flew across the draw before I could check him. Of course the City Marshal happened to be there, and immediately gathered me in and took me before the City Magistrate, charged with violating a city ordinance which prohibited fast driving on the bridge.

Inasmuch as the courts had denied me any rights because of being dead, it occurred to me that the converse of this proposition must necessarily follow, that the courts could not enforce any law against me, for the same reason. I therefore not only plead not guilty, but also the fact that the Superior Court of the State had affirmed the judgment of the Probate Court, wherein the former, in so many words, found that I was dead.

The Magistrate said he didn't care a continental objuration for the Superior Court or the Probate Court either. Here was a plain ordinance against fast driving on the bridge, and I had been caught in the very act of violating it. He didn't care whether I was alive or dead. The law made no distinction, and he would fine a guilty corpse as quick as a live person, and even if I was dead, I had no business to go about in vioation of law, and he didn't propose to give a dead man any greater privileges than a live one in his court. He wound up by giving me five dollars and costs, or five days in jail.

After he had fined me he became inquisitive to know how it happened, and I told him of the horse taking fright from the whistle. He said I ought to have told him that before, as it would require him to modify the action of the Court; said he should let the fine stand, but would strike my name out and insert the name of the

guilty party. He thought the correct thing to do would be to fine both the horse and the tug as *particeps criminis,* hold the horse as security, and libel the tug. He asked me where I got the rig, and I told him from Rawhide, who had a stable on Main street. With that he became a good bit excited and indignant, and said he should enter the fine against Rawhide for permitting a horse to go at large which he knew was viciously accustomed to violate ordinances on every possible occasion. When the Marshal suggested that Rawhide wasn't responsible for the action of the horse, he said he knew better. He said he knew of a case just like it which happened at Huron, South Dakota, about ten years before. A woman by the name of Dineen kept a hotel. She had a husband who lived with her who was vicious and accustomed to beating mankind. One day the husband mashed one of the boarders in the eye, just out of pure devilment, and the injured party sued her for damages in permitting her husband to go at large, she being fully aware of his vicious propensity to beat and strike mankind, and the jury gave $1,500 damages. The case could be found in one of the territorial reports. Under this decision, which he thought was right, he was fully justified in entering the fine against Rawhide, whom he didn't like anyhow.

Whatever may have been the justice or injustice meted out to Rawhide, of one thing I became sensibly aware, and that was that there was no law in my favor when I wanted it, and plenty of it when I didn't want it.

This is one of the many strange experiences I had while waiting the decision of the Supreme Court of the State, to which an appeal was taken. Finally the decision came, and it is given herewith in full. Try and put yourself in my place, and imagine how you would feel at being declared dead.

THE DECISION.

No. 682. Decided December 2, 1892.

Moses H. Scott, Appellant,
agst.
John McNeal and Augustine McNeal, Respondents.

Ejectment — Probate Proceedings — Findings — Absence.

Under the laws of Washington Territory, code of 1881, probate courts were vested with jurisdiction over the estates of deceased

persons, and when the powers of such courts have been invoked by a petition setting forth the jurisdictional facts, among others absence of a party for more than seven years, and that there is no evdence that he is still living, the court is warranted in finding that he is dead, and in ordering administration upon his estate.

In such a case the supposed deceased person, after his return to this State, cannot, as against an innocent person or his grantees, maintain an action of ejectment to recover property sold under a decree of the Probate Court.

Appeal from Superior Court — Thurston County.

The opinion of the Court was delivered by

Scott, J. — This was an action of ejectment against the respondent to recover possession of certain lands in Thurston County. The defendants claim the same under a deed from Samuel C. Ward, who had purchased the land at an administrator's sale. In March, 1881, the appellant, who was at that time a resident of Thurston County, in this State, then territory, mysteriously disappeared. At that time he was the owner of the lands in question, the same being subject to a mortgage given to one T. F. McElroy. After a lapse of over seven years one Mary Scott, who claimed to be a creditor of appellant, filed a petition in the Probate Court of said county, alleging the fact of Scott's disappearance more than seven years previously, and that careful inquiries made by his relations and friends at different times since said disappearance had failed to give any knowledge or information of his whereabouts, or any evidence that he was still living, and alleged that she verily believed him to be dead, and that he had died at the time of his disappearance; that he was never married, and left no last will or testament; and that he left real estate (being the land in controversy) in Thurston County. She also named several minor children of his deceased brother as his heirs; that she was a creditor, etc., and prayed for an administration of his estate. A notice of the hearing of said petition was given, and upon the day set for the hearing witnesses were examined, and the Court found from said testimony that said Scott was dead, and appointed an administrator as prayed for.

A number of objections are raised to the probate records, some of which go to the jurisdiction of the court relating to the sufficiency of the petition and the posting of notices. Appellant alleges that the petition was defective in that it did not state that said Scott was

a resident of Thurston County at the time of his death. The allegation of the petition is:

"That one Moses H. Scott, heretofore a resident of the above-name County and Territory (Thurston County, Washington Territory), mysteriously disappeared some time during the month of March, A. D. 1881, and more than seven years ago."

We think this was sufficient, as the word "heretofore" should be held to relate to the time of his disappearance.

He also objects to the proof of posting the notices, because it appears from the affidavit of the person posting the same that he had posted three of the notices in three public places in Thurston County, as the law required, without stating where they were posted. At the hearing, however, the Court found that due notice of said hearing had been posted in three public places, as required by the statute, and we think the petition, notice and proof were sufficient to give the Probate Court jurisdiction.

The estate was administered step by step down to a sale of the lands to said Ward, and the records were introduced against numerous objections made by the appellant. These objections, however, were mainly aimed at irregularities in the proceedings, which did not affect the jurisdiction of the court, and appellant was not in a position to take advantage of them in a collateral action. In addition to the records of the Probate Court in said matter, a deed from Ward to defendants was also admitted in evidence.

Appellant was a witness in his own behalf, but made no attempt to explain his manner of leaving or his absence.

The defendants, after purchasing the property, took possession of it, and made valuable improvements. They stand in the position of innocent purchasers, and the question is, under this peculiar condition of affairs, which one of the parties must suffer? The equities of the case seem to be clearly with the defendants, for, as the matter appears, appellant wilfully abandoned the property in question, and he certainly had reason to expect that proceedings of the kind would be instituted after a lapse of years in case his relatives and other interested parties should not be able to obtain any information of his existence or whereabouts.

It is argued, however, that to give effect to these probate proceedings, under the circumstances, would be to deprive him of his property without due process of law. The question is a very interesting one. It has been passed upon by other courts, and the decisions are conflicting. The action of the lower court in this

instance is sustained by the case of Roderigas v. East River Saving Institution, 63 N. Y. 460. This case has received much adverse criticism, and also some favorable comment. The appellant argues that it would be inapplicable here, because under the New York statutes the court, in an application for letters of administration, had authority to find the fact as to the death of the intestate, which, under the laws of this territory, was not a matter of issue. But we are unable to agree with him. Our statutes only authorize administration of the estates of deceased persons, and before granting letters of administration, the court must be satisfied by proof of the death of the intestate. The proceeding is substantially *in rem*, and all parties must be held to have received notice of the institution and pendency of such proceedings where notice is given as required by law. Sec. 1290 of the 1881 code gave the Probate Court exclusive original jurisdiction in such matters, and authorized such court to summon parties and witnesses and examine them touching any matter in controversy before said court, or in the exercise of its jurisdiction.

We are of the opinion that it would serve no good purpose to undertake a review of the various cases and criticisms bearing upon this subject, but content ourselves with a reference to Woerner's Am. Law of Administration, secs. 210, 211, and authorities there cited.

Under the circumstances of this case, and after the best examination we have been able to give the matter, we are inclined to follow the Roderigas case.

The judgment of the court below is affirmed.

Anders, C. J., and Dunbar, Hoyt and Stiles, JJ., concur.

CHAPTER XII.

WHAT NEXT?

It is often remarked that "it is the unexpected which happens," but somehow in my case nearly all the rules applicable to mankind are reversed, and in this particular instance it was the expected which happened. I mean that the Supreme Court of the State of Washington, as I expected, has followed the other courts, and I am now three times declared judicially dead. "Three times and out," is the common expression, but when you come to apply it to a man who is trying his level best to be alive, it becomes seriously discour-

aging. I have neither the desire nor the ability to criticise the court, still somehow I cannot agree with their reasoning or conclusions. It is said I did not explain my manner of leaving, or my absence. Suppose I had said that I left on the railroad, or by steamer, or walked off, or went up in a balloon, or was kidnapped; I don't see why, if the defendant was an innocent purchaser, that would make any difference. I certainly did not explain my absence, for I had supposed I could retain title to my property even if I lived in a neighboring State.. It is further urged that I " wilfully abandoned " my property, and had " reason to expect that proceedings of this kind would be instituted after a lapse of years," in case my relatives and other interested parties should not be able to obtain any information of my existence or whereabouts.

As to the wilful abandonment of my property, I can only say that, being real estate, extensive in its nature, cumbersome and expensive in transportation, I could not well carry it with me, and besides, it would not have been worth any more in California, after I got it there, than it was here. Besides, to carve out and remove so large a section of the earth would leave a dangerous pitfall into which unwary travelers and animated property might walk, to their serious discomfort, and perhaps considerable damage. Then again, it would be setting a bad example, for others might take away their possessions, and leave the country seriously embarrassed by reason of loss of revenue arising from taxation. Certainly I would be culpable indeed in instituting such a movement. Again, after it was removed it would cost considerable to store it, or permanently place it, for in California there is stacked naturally a good deal of earth. No, I left my property here " to all legal intents and purposes," and I left it in good hands. An estimable gentleman, Mr. Tax Title, lived here, and I had every reason to expect he would look after it. In fact, that was his principal business, looking after orphaned property, paying taxes, searching for owners, and generally taking benevolent charge while the owner was away, and restoring it to him free of charge on his return, or making provision in his will that his executors should do so in case of his sudden demise. I relied with great confidence in Mr. Tax Title, and cannot yet understand why he neglected me. This, I trust, will sufficiently answer the charge of wilful abandonment.

Again, I cannot see why it necessarily follows that I would have reason to expect proceedings of this nature by reason of the lapse of years, in case my relatives or other interested parties should not be

able to obtain information of my whereabouts of existence. On the contrary, I submit that lapse of years and lack of information are no just or reasonable grounds for declaring a man dead. In fact, it would be a dangerous rule to adopt. No one can stop the flight of years, while greed and avarice would speedily obliterate all information of one whose possessions were looked upon with covetous eyes. I am willing to go on record as saying that many a poor mortal would speedily lose sight of a near relative, and voluntarily cease to have, or be able to obtain, any knowledge or information regarding his existence or whereabouts, if thereby he might become possessed of some valuable estate. The temptation would be dangerous and great. True, the party whose property was first probated might reciprocate by applying a like presumption to some other relative and get *his* property, and in the end even up; still, quite likely it would be productive of considerable confusion and embarrassment, and might result in estrangement. Suppose you possessed a fine ranch in Washington, upon which you expected to spend your declining years in peace and happiness, and some fine morning your eastern mother-in-law, with whom you had not kept up an affectionate correspondence "for a lapse of years," should walk in and take possession under a New Jersey administrator's deed, and literally eject you from beneath your own vine and fig tree, would you not lose considerable regard for both your mother-in-law and New Jersey law? And if she should be deaf to your expostulations, might it not result at least in temporary estrangement? Mothers-in-law often possess peppery dispositions, and a prudent and peaceable man naturally hesitates about assuming an antagonistic position toward them, both individually and as a class, and is apt to avoid anything tending toward additional provocation.

Again, it is said that I should "have reason to expect" these proceedings, owing to my absence, and while that may be true, does such expectation justify the action or make it right? I am naturally afraid of snarling dogs and beasts of prey, and have reason to expect that they will bite me when opportunity offers, but somehow I never felt that they had any right to do so, or that I would be doing wrong by running away, or climbing a tree, or seeking other means of refuge or defense.

These question perplex me not a little, for it practically results in this: That when I want to assert any right against others the courts say I am dead; and when they want to enforce any rights against me, then the courts say I am alive.

CHAPTER XIII.

I AM ALIVE.

I have just finished reading "Our Mutual Friend." To me it is a wonderful book, rendered so, doubtless, by the striking similarity between myself and the character of John Harmon, or John Rokesmith.

He had been found dead by the coroner's inquest, and proclaimed dead by the government. He reasoned the matter in every light as to whether or not he should come to life. As in my case, a friend was suspected of his murder, and his property was pursued by harpies as well as friends. He first decided to remain dead, but subsequent events rendered it necessary for him to come to life and resume his rights. It seems as if Dickens had actually written my biography.

The Probate Court declared that I was "dead to all legal intents and purposes;" the Superior Court found in express terms that I was dead for all purposes; and the Supreme Court confirmed both decisions, with the added element running through its declaration that I ought to be dead even if I wasn't, and that I might have expected just such a result. I confess that I was in what a friend of mine would call a "squandery." Of course, I could disappear at any time by ceasing to use the Immortal Materializer, and many times I was seriously resolved so to do. The comparatively small amount involved in litigation, which I expected soon to give away anyhow, would hardly justify further effort or worry on my part. On the other hand, a man naturally hates to be beaten or defeated in any laudable undertaking, and I could not bring myself to believe that my object had been reprehensible, dishonest or unjust. Again, it seemed to be my duty to test this question to the fullest extent for the purpose of establishing a precedent, to the end that when a man dies he may know exactly what property rights he retains, and what he surrenders. Observation confirms the fact that death has, hitherto, been the signal for a hasty and irreverent scramble for the earthly accumulations of which one dies possessed. The glitter of gold pierces the sorrows of the grave. The true mourner is rudely thrust aside in the rush of the mad multitude which seeks to "part the garments" of the estate ere the liberated spirit of its former owner has found its celestial abiding place.

I doubt not it is true, nay, I am convinced of the fact, that in many

instances spirits who lingered near the earth after death still controlled by the love they bore those left behind, when they witnessed the greed, avarice and covetousness exhibited by those who simulated sorrow at the grave, have instantly longed for but one hour more of mortal life, just enough to enable them to sell all they had and give to the poor, or, if need be, to gather up their possessions and fling them to the four winds of the heaven.

Let it once be firmly established that a man has the legal right, after death, to return and resume his property, to the end that it may not be diverted from its legitimate object and purpose, and it will forever put an end to the litigations exhibited over estates, with their accompanying strifes, contentions and perjuries.

In furtherance of this purpose, I took an appeal to the Supreme Court of the United States, and endeavored to possess my soul in patience until a decision could be reached.

Some time in May, 1894, I was accosted by a stranger, a fine appearing man, somewhat stately in manner, but scrupulously polite. He inquired my name, and gave as a reason therefor the fact that he had a communication of importance to make when he became satisfied of my identity. I had met many cranks in my life, and doubted not but he was of that class, but evidently a new species; therefore I very gravely, and with some inward anticipations of pleasure as to the finale, assured him of my identity, and even went with him to several citizens of known standing to confirm my statement. Finally he declared himself satisfied, and asked me to accompany him to his room at the hotel, saying he desired strict privacy to attend the communication. We therefore went to the hotel and to his room. After entering he locked the door, looked about the room, tried a door leading to an adjoining room, and, apparently being satisfied, turned to me. I had closely observed his proceeding, though without appearing so to do, and waited quietly his further action. Placing himself at a little distance in front of me, he assumed a martial attitude, gravely took from his inner pocket a large package of papers, which he deliberately unfolded, and which appeared to be fastened with many ribbons and seals. Holding the paper in his hand, he gazed intently at me, and with great deliberation and dignity addressed me.

"Sir," said he, "I am the official Communicator."

I recognized the fact that I had foolishly and recklessly placed myself in the absolute power of a dangerous lunatic, but instantly divining that it would be safer to humor him and manifest no anx-

iety, I with equal dignity bowed to him and desired to be enlightened, if compatible with his gracious prerogative and duty, as to the particular august body, potentate or power he represented, and of which he was the Official Communicator.

"I beg your pardon," he replied; "I should have been more explicit." Handing me one of the two papers he held in his hand, he continued:

"I am the Official Communicator of the Supreme Court of the United States, and it becomes my duty, and pleasure as well, to deliver to you a duly attested copy of the proposed decision of that court, in the case of Scott v. McNeal et al., and it is also my duty to read it to you in full. The decision, as you will soon know, is in your favor, but inasmuch as litigants often change their minds during the time which necessarily elapses between the date of appeal and final decision, the Court has adopted a rule not to render a decision in any one's favor without first officially ascertaining that the suitor still desires the relief prayed for. Should this meet with your approval, you will, at the close of the communication, so signify, and I will then make it known to the Court, and the judgment will be entered of record. Kindly be seated and listen carefully. Should you not fully understand the several matters presented and decided, you are at liberty to interrogate me, and I shall be pleased to more fully enlighten you."

With that we seated ourselves, and he proceeded to read as follows:

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

Scott v. McNeal. } No. 890.

Submitted October 23, 1893.

Decided May 14, 1894.

Mr. Justice GRAY, after stating the case, delivered the opinion of the Court.

The plaintiff formerly owned the land in question, and still owns it, unless he has been deprived of it by a sale and conveyance under order of the Probate Court of the County of Thurston and Territory of Washington, by an administrator of his estate appointed by that Court on April 20, upon a petition filed April 2, 1888.

The form of the order appointing the administrator is peculiar. By that order, after reciting that the plaintiff disappeared more than

seven years before, and had not since been seen or heard of by his relatives and acquaintances, and that the circumstances at and immediately after the time when he was last seen, about eight years ago, were such as to give them the belief that he was murdered about that time, the Probate Court finds that he "is dead to all legal intents and purposes, having died on or about March 25, 1888," that is to say, not at the time of his supposed murder seven or eight years before, but within a month before the filing of the petition for administration. The order also, after directing that Milroy be appointed administrator, purports to direct that "letters of guardianship" issue to him upon giving bond; but this was evidently a clerical error in the order, or in the record, for it appears that he received letters of administration and qualified under them.

The fundamental question in the case is, whether letters of administration upon the estate of a person who is in fact alive have any validity or effect against him.

By the law of England and America, before the Declaration of Independence and for almost a century afterwards, the absolute nullity of such letters was treated beyond dispute.

In Allen v. Dundas, 3 J. R. 125, in 1789, in which the Court of King's Bench held the payment of a debt due to a deceased person, to an executor who had obtained probate of a forged will, discharged the debtor, notwithstanding the probate was afterwards declared null and void, and administration granted to the next of kin, the decision went upon the ground that the probate, being a judicial act of the Ecclesiastical Court within its jurisdiction, could not, so long as it remained unrepealed, be impeached in the temporal courts. It was agreed for the plaintiff that the case stood as if the creditor had not been dead, and had himself brought the action, in which case it was assumed, on all hands, that payment to an executor would be no defense. But the Court clearly stated the essential distinction between the two cases. Mr. Justice Ashurst said: "The case of a probate of a supposed will during the life of the party may be distinguished from the present, because during his life the Ecclesiastical Court has no jurisdiction, nor can they inquire who is his representative; but when the party is dead it is within their jurisdiction." And Mr. Justice Breller said: Then this case was compared to a probate of a supposed will of a living person; but in such a case the Ecclesiastical Court has no jurisdiction, and the probate can have no effect; their jurisdiction is only to grant probates of wills of dead persons. The distinction in this respect is this: If

they have jurisdiction, their sentence, as long as it stands unrepealed, shall avail in all other places, but when they have no jurisdiction their whole proceedings are a nullity. 3 T. R. 129, 130. And such is the law of England to-day. Williams on Executors (9th Ed), 478, 1795; Taylor on Ev. (8th Ed), secs. 1677, 1714.

In Griffith v. Frazier, 8 Cranch, 9, 23, in 1814, this Court, speaking by Chief Justice Marshall, said: "To give the ordinary jurisdiction, a case in which, by law, letters of administration may issue, must be brought before him. In the common case of intestacy it is clear that letters of administration must be granted to some person by the ordinary; and though they should be granted to one not entitled by law, still the act is binding until annulled by the competent authority, because he had power to grant letters of administration in the case. But suppose the administration be granted on an estate of a person not really dead. The act, all will admit, is totally void. Yet the ordinary must inquire and decide whether the person whose estate is to be committed to the care of others be dead or in life. It is a branch of every cause in which letters of administration issue. Yet the decision of the ordinary, that the person on whose estate he acts is dead, if the fact be otherwise, does not vest the person he may appoint with the character or powers of an administrator. The case, in truth, was not within his jurisdiction. It was not one in which he had the right to deliberate. It was not committed to him by law. And although one of the points occurs in all cases for his tribunal, yet that point cannot bring the subject within his jurisdiction." See also Mutual Benefit Ins. Co. v. Tisdale, 91 U. S. 238, 243; Hegler v. Faulkner, 153 U. S. 109, 118.

The same doctrine has been affirmed by the Supreme Court of Pennsylvania, in a series of cases beginning seventy years ago. McPherson v. Cunliff (1824), 11 S. & R. 422, 430; Peeble's Appeal (1826), 15 S. & R. 39, 42; Devlin v. Commonwealth (1882), 101 Pa. St. 273. In the last of these cases it was held that a grant of letters of administration upon the estate of a person who, having been absent and unheard from for fifteen years, was presumed to be dead, but who, as it afterwards appeared, was in fact alive, was absolutely void, and might be impeached collaterally.

The Supreme Judicial Court of Massachusetts, in 1861, upon full consideration, held that an appointment of an administrator of a man who was in fact alive, but had been absent and not heard from for more than seven years, was void, and the payment to such an administrator was no bar to an action brought by the man on his

return; and in answer to the suggestion of counsel, that "seven years' absence upon leaving one's usual home or place of business without being heard of authorizes the judge of probate to treat the case as though the party were dead," the Court said: The error consists in this, that those facts are only presumptive evidence of death, and may always be controlled by other evidence showing that the fact was otherwise. The only jurisdiction is over the estate of the dead man. When the presumption arising from the absence of seven years is overthrown by the actual personal presence of the supposed dead man, it leaves no ground for sustaining the jurisdiction. Jochumsen v. Suffolk Savings Bank, 3 Allen, 87, 96. See also Waters v. Stickney, 12 Allen, 1, 13; Day v. Floyd, 130 Mass. 488, 489.

The Civil Code of Louisiana, in title 3, "Of Absentees," contains provisions for the appointment of a curator to take care of the property of any person who is absent from or resides out of the State without having left an attorney therein; and for the putting of his presumptive heirs into provisional possession after he has been absent and not heard from for five, or, if he left an attorney, seven years, or sooner if there be strong presumption of his death; and for judicial sale, if necessary, of his movable or personal property and safe investment of the proceeds; and upon proof that he has not been heard from for ten years, and has left no known heirs, for sale of his whole property, and payment of the proceeds into the treasury of the State, as in the case of vacant successions; but neither the curator, nor those in provisional possession, can alienate or mortgage his immovables or real estate; and if he returns at any time he recovers his whole property, or the proceeds thereof, and a certain portion of the annual revenues, depending upon the length of his absence. The main object of these provisions, as their careful regulation shows, is to take possession of and preserve the property for the absent owner, not to deprive him of it upon an assumption that he is dead. Accordingly the Supreme Court of Louisiana held that the appointment, by a Court having jurisdiction of successions, of an administrator of the estate of a man represented to be dead, but who was in fact alive at the time of the appointment, was void; and that persons claiming land of his, under a sale by such administrator, under order of the Court followed by long possession, could not hold the land against his heirs, and, speaking by Chief Justice Manning, said: "The title of Hotchkiss as administrator is null, because he had no authority to make it; and the presumption pleaded does

not validate it. It was not a sale, the informalities of which are cured by a certain lapse of time, and which becomes perfect by prescription; but it was void because the Court was without authority to order it. It is urged on the part of the defendants that the decree of the Court order in the sale of the succession property should protect them, and as the Court which thus ordered the sale had jurisdiction of succession, it was not for them to look beyond it. But that was assuming as true that which we know was not true. The owner was not dead. There was no succession." And the Court added that Chief Justice Marshall, in Griffith v. Frazier, above cited, disposed of that position. Burns v. Van Loan (1877), 29 La. Ann. 560, 563.

The absolute nullity of administration granted upon the estate of a living person has been directly adjudged or distinctly recognized in the courts of many States. French v. Frazier (1832), 7 J. J. Marsh, 525, 527; State v. White (1846), 7 Iredell, 116; Duncan v. Stewart (1854), 25 Alabama, 408; Andrews v. Avory (1858), 11 Grattan, 229, 236; Moore v. Smith (1858), 11 Richardson, 569; Morgan v. Dodge (1862), 44 N. H. 255, 259; Withers v. Patterson (1864), 27 Texas, 491, 497; Johnson v. Bearzley (1877), 65 Mo. 250, 264; Melia v. Summons (1878), 45 Wis. 334; D'Arusement v. Jones (1880), 4 Lea (Tenn.), 251; Stevenson v. Superior Court, 62 Calif. 60; Perry v. St. Joseph & W. Ry. (1882), 29 Kans. 420; Thomas v. People (1883), 107 Ill. 517, in which the subject is fully and ably treated.

The only judicial opinions cited at the bar (except the judgment below in the present case) which tend to support the validty of letters of administration upon the estate of a living person were delivered in the courts of New York and New Jersey within the last twenty years.

In Roderigas v. East River Savings Institution, 63 N. Y., 460, in 1875, a bare majority of the Court of Appeals of New York decided that payment of a deposit in a savings institution to an administrator, under letters of administration issued in the lifetime of the depositor, was a good defense to an action by an administrator appointed after his death, upon the ground that the statutes of the State of New York made it the duty of the Surrogate, when applied to for administration on the estate of any person, to try and determine the question whether he was alive or dead, and therefore his administration of that question was conclusive. The decision was much criticised as soon as it appeared. Notably by Chief Justice Redfield in 15 Am. Law Reg. (N. S.) 212. And in a subsequent case between the

same parties, in 1879, the same court unanimously reached a different conclusion, because evidence was produced that the Surrogate never, in fact, considered the question of death, or had any evidence thereof — thus making the validity of letters of administration to defend not upon the question whether the man was dead, but upon the question whether the Surrogate thought so. 76 N. Y. 316.

In Plume v. Howards Savings Institution, 17 Vroom. (46 N. J. Law), 211, 230, in 1884, which was likewise an action to recover the amount of a deposit in a savings institution, the plaintiff had been appointed by the Surrogate administrator of a man who, as the evidence tended to show, had neither drawn out any of the deposit, nor been heard from for more than twenty years; an inferior court certified to the Supreme Court of New Jersey the question whether payment of the amount to the plaintiff would bar a recovery thereof by the depositor, and whether the plaintiff was entitled to recover. And that Court, in giving judgment for the plaintiff, observed, by way of distinguishing the case from the authorities cited for the defendant, that " in most, if not all, of such cases, it was affirmatively shown that the alleged decedent was actually alive at the time of the issuance of letters of administration, while in the present case there is no reason for even surmising such to have been the fact."

The grounds of the judgment of the Supreme Court of the State of Washington in the case at bar, as stated in its opinion, were that the equities of the case appeared to be with the defendants; that the Court was " inclined to follow " the case of Roderigas v. East River Savings Institution, 63 N. Y. 460; and that under the laws of the Territory the Probate Court, on an application for letters of administration, had authority to find the fact as to the death of the intestate, the Court saying: " Our statutes only authorize administration of the estate of deceased persons, and before granting letters of administration the Court must be satisfied by proof of the death of the intestate. The proceeding is substantially *in rem*, and all parties must be held to have had notice of the institution and pendency of such proceedings when notice is given as required by law. Section 1299 of the 1881 Code gave the Probate Court exclusive original jurisdiction in such matters, and authorized such Court to summon parties and witnesses and examine them touching any matter in controversy before said Court in the exercise of its jurisdiction." Such were the grounds upon which it was held that the plaintiff had not been deprived of his property without due process of law. 5 Wash. 309.

After giving the opinion of the Supreme Court of the State the respectful consideration to which it is entitled, we are unable to concur in its conclusion, or in the reasons on which it is founded.

The Fourteenth Article of the Amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains: "Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

These prohibitions extend to all acts of the State, whether through its legislative or its judicial authorities. Virginia v. Rivers, 100 U. S. 313; Ex parte Virginia, 100 U. S. 339; Neal v. Delaware, 103 U. S. 370. And the first one, as said by Chief Justice Wait, in United States v. Cruikshank, 92 U. S. 542, repeating the words of Mr. Justice Johnson, in Bank of Columbia v. Okely, 4 Wheaton, 235, was intended "to secure the individual from the arbitrary exercise of powers of government, unrestrained by the established principles of private rights and distributive justice.

Upon a writ of error to review the judgment of the highest court of a State, upon the ground that the judgment was against a right claimed under the Constitution of the United States, this Court is no more bound by that court's construction of a statute of the territory or of the State, when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the State, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another State. In every such case this Court must decide for itself the true construction of the statute. Huntington v. Attrill, 146 U. S. 657; Mobile & Ohio Ry. v. Tennessee, 153 U. S. 486, 492.

No judgment of a Court is due process of law if rendered without jurisdiction in the court, or without notice to the party.

The words "due process of law," when applied to judicial proceedings, as was said by Mr. Justice Fields, speaking for the Court, "mean a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution — that is, by the law of its creation — to pass upon the subject-matter of the suit; and if that involves merely a determination of the personal liability of the defendant, he must

be brought within its jurisdiction by service of process within the State, or his voluntary appearance. Pennoyer v. Neff, 95 U. S. 714.

Even a judgment in proceedings strictly *in rem* binds only those who have made themselves parties to the proceedings, and who had notice either actually or by the thing condemned being first seized into the custody of the Court. *The Mary*, 9 Cranch, 126, 144; Hollingsworth v. Barbour, 4 Peters, 446; Pennoyer v. Neff, 95 U. S. 714. And such a judgment is wholly void if a fact essential to the jurisdiction of the Court did not exist. The jurisdiction of a foreign Court of Admiralty, for instance, in some cases, as observed by Chief Justice Marshall, " unquestionably depends as well on the state of the thing as on the constitution of the court. If by any means whatever a prize court should be induced to condemn, as a prize of war, a vessel which was never captured, it could not be contended that this condemnation operated as a charge of property. Rose v. Himely, 4 Cranch, 241, 269. Upon the same principle, a decree condemning a vessel for unlawfully taking clams, in violation of a statute which authorized proceedings for her forfeiture in the county in which the seizure was made, was held by this Court to be void, and not to protect the officer making the seizure from a suit by the owner of the vessel, in which it was proved that the seizure was not made in the same county, although the decree of condemnation recited that it was. Thompson v. Whitman, 18 Wall. 457.

The estate of a person supposed to be dead is not seized or taken into custody of the court of probate upon the filing of a petition for administration, but only after and under the order granting the petition; and the adjudication of that court is not upon the question whether he is living or dead, but only upon the question whether and to whom letters of administration shall issue. Mutual Benefit Ins. Co. v. Tisdale, 91 U. S. 238.

The local law on the subject, contained in the Code of 1881 of the Territory of Washington, in force at the time of the proceedings now in question, and since continued in force by article 27, section 2, of the Constitution of the State, does not appear to us to warrant the conclusion that the Probate Court is authorized to conclusively decide, as against a living person, that he is dead, and his estate, therefore, subject to be administered and disposed of by the Probate Court.

On the contrary, that law, by its very terms, appears to us to recognize and assume the death of the owner to be a fundamental condition and prerequisite to the exercise by the Probate Court of

jurisdiction to grant letters testamentary or of administration upon his estate, or to license any one to sell his lands for payment of his debts. By par. 1, the common law of England, so far as not inconsistent with the Constitution and laws of the United States, or with the local law, is made the rule of decision. In the light of the common law the exclusive original jurisdiction conferred by par. 1299 upon the Probate Court, in the probate of wills and the granting of letters testamentary or of administration, is limited to the estates of persons deceased; and the power conferred by that section to summon and examine on both, as parties or witnesses, executors and administrators, or other persons entrusted or accountable for the "estate of any deceased person," and "any person touching any matter of controversy before said Court or in the exercise of its jurisdiction," is equally limited by par. 1340. Wills are to be proved and letters testamentary or of administration are to be granted in the county of which the deceased was a resident," or in which "he may have died," or in which any part of his estate may be, "he having died out of the Territory."

By par. 1388 administration of the estate of "a person dying intestate" is to be granted to relatives next of kin or creditors in a certain order, with a proviso, in case the person so entitled or intrusted neglect "for more than forty days after the death of the intestate," to apply for administration. By par. 1389 an application for administration must "set forth the facts essential to giving the Court jurisdiction of the case," and state "the names and places of residence of the heirs of the deceased, and that the deceased died without will;" and by par. 1391 notice of such application is to be given by posting in three public places in the county where the Court is held a notice "containing the name of the deceased," the name of the applicant and the time of hearing. And by par. 1493 and 1494 a petition by an executor or administrator for the sale of real estate for the payment of debts must set forth "the amount of the personal estate that has come into his hands, and how much, if any, remains undisposed of, a list and the amounts of the debts outstanding against the deceased, as far as the same can be ascertained, a description of all the real estate of which the testator or intestate died seized, the condition and value of the respective lots and partitions, the names and ages of the devisees, if any, and of the heirs of the deceased;" and must show that it is necessary to sell real estate "to pay the allowance to the family, the debts outstanding against the deceased, and the expenses of administration."

Under such a statute, according to the overwhelming weight of authority, as shown by the cases cited in the earlier part of this opinion, the jurisdiction of the court to which is committed the control and management of the estates of deceased persons, by whatever name it is called, ecclesiastical court, probate court, orphan's court, or court of the ordinary or surrogate, does not exist or take effect before death. All proceedings of such courts in the probate of wills and the granting of administration depend upon the fact that a person is dead, and are null and void if he is alive. Their jurisdiction in this respect being limited to the estates of deceased persons, they have no jurisdiction whatever to administer and dispose of the estates of living persons of full age and sound mind, or to determine that a living man is dead, and therefore undertake to dispose of his estate. A court of probate must, indeed, inquire into and be satisfied of the fact of the death of the person whose will is sought to be proved, or whose estate is sought to be administered, because without that fact the Court has no jurisdiction over his estate; and not because its decision upon the question whether he is living or dead can in any wise bind or estop him, or deprive him, while alive, of the title or control of his property.

As the jurisdiction to issue letters of administration upon his estate rests upon the fact of his death, so the notice given before issuing such letters assumes the fact and is addressed, not to him, but to those who, after his death, may be interested in his estate, as next of kin, legatees, creditors or otherwise. Notice to them cannot be notice to him, because all their interests are adverse to his. The whole thing, so far as he is concerned, is *res inter alios acta.*

Next of kin or legatees have no rights in the estate of a living person. His creditors, indeed, may, upon proper proceedings and due notice to him, in a court of law or equity, have specific portions of his property applied in satisfaction of their debts. But neither creditors or purchasers can acquire any rights in his property through the action of a court of probate or of an administrator appointed by the court, dealing without any notice to him, with his whole estate as if he were dead.

The appointment by the Probate Court of an administrator of the estate of a living person, without notice to him, being without jurisdiction and wholly void as against him, all acts of the administrator, whether approved by the Court or not, are equally void; the receipt of money by the administrator is no discharge of a debt, and a conveyance of property by the administrator passes no title,

The fact that a person has been absent and not heard from for seven years may create such a presumption of his death as, if not overcome by other proof, is such *prima facie* evidence of his death that the Probate Court may assume him to be dead, and appoint an administrator of his estate, and that such administrator may sue upon a debt due to him. But proof, under proper proceedings, even in a collateral suit, that he was alive at the time of the appointment of the administrator, controls and overthrows the *prima facie* evidence of his death, and establishes that the Court had no jurisdiction and the administrator no authority; and he is not bound either by the order appointing the administrator or by a judgment in any suit brought by the administrator against a third person, because he was not a party to and had no notice of either.

In a case decided in the Circuit Court of the United States for the Southern District of New York, in 1880, substantially like Roderigas v. East River Savings Institution, as reported in 63 N. Y. 460, above cited, Judge Choate, in a learned and able opinion, held that letters of administration upon the estate of a living man, issued by the surrogate after judicially determining that he was dead, were null and void as against him; that payment of a debt to an administrator so appointed was no defense to an action by him against the debtor; and that to hold such administration to be valid against him would deprive him of his property without due process of law, within the meaning of the Fourteenth Amendment of the Constitution of the United States. This Court concurs in the proposition there announced, " that it is not competent for a State, by a law declaring a judicial determination that a man is dead, made in his absence, and without any notice to or process issued against him, conclusive for the purpose of divesting him of his property and vesting it in an administrator, for the benefit of his creditors and next of kin, either absolutely or in favor of those only who innocently deal with such administrator. The immediate and necessary effect of such a law is to deprive him of his property without any process of law whatever as against him, although it is done by process of law against other people, his next of kin, to whom notice is given. Such a statutory declaration of estoppel by a judgment to which he is neither a party nor privy, which has the immediate effect of divesting him of his property, is a direct violation of this constitutional guaranty. Lavin v. Emigrant Industrial Savings Bank, 18 Blatchford, 1, 24.

The defendants did not rely upon any statute of limitations, nor upon any statute allowing them for improvements made in good

faith; but their sole reliance was upon a deed from an administrator, acting under the orders of a court which had no jurisdiction to appoint him, or confer any authority upon him as against the plaintiff.

Judgment reversed and case remanded to the Supreme Court of the State of Washington for further proceedings not inconsistent with this opinion.

DISSENTING OPINION.

Which Should Have Been Written, But Was Not — in Which All Should Have Concurred, But Did Not.

Fuller, C. J. — Although concurring in the result, I am compelled to dissent from the reasoning of the majority opinion in this case, and for reasons which, to my mind, are so weighty and far-reaching that to disregard them would be a dereliction of duty on my part. Great and grave principles, sacred in their nature, are involved herein, and I should be false to my trust did I not sound the note of alarm.

Of the three great branches of the government, this is the most important. In a popular sense they are usually referred to as co-ordinate in their nature — Executive, Legislative and Judicial. Viewed from a legal and logical standpoint, however, this co-ordinate relation does not exist. The judiciary, of which this body is the supreme and ultimate representative, constitutes the superior, and the executive and legislative departments the inferior or subordinate branches of government.

Legislative bodies may create and enact laws, but we have the power to interpret, dissect and, if deemed necessary or advisable, annul and obliterate them.

The legislative branch ranks next in degree to that of the judiciary. The executive branch is one degree further removed, and is even subject and subordinate to that of the legislative.

Our duties, then, should be discharged clearly within the realm of this demarcation, keeping in view the fact that all principles must finally be refined in the judicial mint. We stand as the final bulwark between law and order on the one side, and revolution and anarchy on the other. The instant we suffer or permit this wall to be broken down, or its foundation disturbed, that instant the stately edifice of free government totters to its fall, and Liberty weeps over the freedom of a mighty people departed.

The power and protection which we rightly arrogate to the judiciary permeates and pervades its every department. The honest, though unlettered, justice of the peace may hold the scales of justice with as firm a grasp, and note its balancing with as clear a vision as the Chief Justice of the United States. The record of his Court, and that of all intermediate courts up to our own, not only import verity, but are beyond the reach or cavil of any profaning hand or mind, whether they come as single spies or in battalions.

Keeping closely in view the above principles, let us pass to a consideration of the case on its merits.

The Probate Court of Thurston County, Territory of Washington, was, in 1881, a court of record; it was a part of the judicial system of the United States. It had been duly organized, and possessed the requisite officers necessary to administer the law within its department, and in an admirable manner it entered a judgment of record, wherein, on the 25th day of March, 1888, it was adjudged that one Moses Scott was "dead to all legal intents and purposes." This judgment was never reversed, modified or set aside, but stands to-day complete in all its parts. We are now asked not only to ignore it, but to absolutely wipe it out of existence. This appeal comes to us not from that judgment, but from an independent action, one which draws in question and attacks collaterally the original judgment entered in the case. The respect which is due from one court to another cannot for a moment permit this to be done. Should we disregard that judgment, then every other court in the United States would be fully justified in disregarding and ignoring every judgment which has been or may be rendered and entered by this Court. The result need not be described, as every court would be a law unto itself.

Passing then from the consideration of these principles, which ought ever to be our guide, and which should be decisive of the case, let us observe what other principles of equity and good conscience are necessarily violated as the result of the majority opinion herein.

It is assumed that the Moses Scott, plaintiff in error herein, is the same Moses Scott who was declared dead by the Probate Court, and that he was alive *(in esse corporealibus)* at the date of the decree, an assumption in which I do not concur. But waiving that point, the broad proposition is asserted, without qualification or exception, that any and every live person may successfully attack, collaterally, a decree of this character. To my mind the well-known principle of

an estoppel *in pais* may, nay, ought to be, invoked in opposition thereto, excepting, however, as to minors ,women and *non compos mentis.*

In Dickenson v. Colgrove et al., 10 Otto, 578, this Court defined an equitable estoppel as " the vital principle that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. It involves fraud and falsehood, and the law abhors both. Such a position is sternly forbidden."

It is shown by the record that Moses Scott voluntarily disappeared, and thereafter, for seven years and more, was utterly lost to all relatives and creditors. He could have broken the silence and made his existence known. He did not do so. Nor has he made any explanation of such absence and silence or offered any excuse. He was presumed to know the effect of such action, and the conclusion which the law draws therefrom, namely, death. His creditors waited the seven years for him to speak. They implored him to speak, but he remained obdurate. Because he was silent when he should have spoken he ought not now to be permitted to speak, when he ought to remain silent. His property was sold, and the present owners, if turned out of their possessions, will be injured through no fault of their own. By his appearance and the assertion of his claim he is certainly " disappointing the expectations " upon which his creditors acted and had a right to act. Here, then, we have the clearest illustration of an equitable estoppel, one that was created solely by the acts of the plaintiff in error, and yet we are asked to disregard the principles of equity and reward him because of the injury which he has inflicted upon others. This involves " fraud and falsehood, and the law abhors both." It is a " change of position sternly forbidden by the law."

With these facts staring him in the face, what right had Moses Scott to come to life? Will it be urged that he was ordered so to do by courts of the Celestial or Infernal regions? If such be the justification, I answer that it would result in a direct conflict of authority and jurisdiction between the courts named and our own. It would be an attempt on their part to usurp jurisdiction within the physical world, against which, for self-protection, if for no other reason, we should record our inflexible opposition. There are no treaties in existence, nor formulated and accepted international laws connecting mundane and Celestial and Infernal courts which bind,

authorize or require us to permit the execution of any mandate from those courts exclusively within our own realm and jurisdiction. We are not bound even to take judicial notice of their decrees or judgments, and we cannot too jealously guard the department of administrative justice which has been placed in our keeping and under our exclusive control. A recognition of such foreign decrees would result in a virtual abolition of this court; it would mean the invasion and enforcement of laws not suited to the education or desires of our people, and in the creation of which their voice was never heard. Can it be argued with any degree of confidence that the sublunated, visionary, supernatural, ethereal and transcendental laws of the Celestial world would be suited to the habits and conditions of our people, wedded as they are to our form of government, and filled with worldly aspirations? The contemplation of airy and abstract laws, the dream of the visionary, the realm of the mystic and the speculation of the disembodied spirit may entertain and satisfy those who have renounced their earthly citizenship, but as a means of governing and regulating the affairs of this world they would prove a delusion and a snare, and but as sounding brass and tinkling cymbal.

On the other hand, contemplate the adoption and enforcement of the laws which have been, or may be, formulated by the leading authority and reigning sovereign of the Infernal regions! His form of government is nearly allied to that of an absolute monarchy. His laws are not suited to the conditions of members of a simple republic. They are not calculated to enhance our enjoyment, preserve our liberties or promote our well-being. Unless tradition and history mislead us, he is tyranical in disposition, arbitrary in his decrees, opposed to free government, and is not attached to the principles of the Constitution of the United States, nor well disposed to the good order and happiness of the same. He would regard the Declaration of Independence with disdain, and contemplate with no friendly vision the safeguards of our laws and constitutions. Unhappy, indeed, would be the condition of that people whose constitutonal rights, happiness and liberty were entrusted to his safekeeping. However honorable his prior record, his reign since he established an independent kingdom under the name of "Lucifer the First" does not commend itself to a well-regulated and reflecting mind. Every person mindful of his future well-being may well hesitate in selecting him as a guardian. A charitable judgment or optimistic vision give small promise of reformation, for his reason

seems to have "fled to brutish beasts." Other and weightier reasons might be urged, but these will suffice for the present. The only safety lies in the close application of the principles of an equitable estoppel, against which Lucifer and his laws cannot successfully prevail.

As before observed, the rule of equitable estoppel should not be invoked against minors, women and that large and ever-increasing class of *non compos mentis*. The reasons therefor require no elaborate discussions. A minor, as a rule, cannot be bound by contract, and without a contract, or some act which concerns property, an equitable estoppel cannot arise. Moses Scott may have been a minor; the record is silent on this subject, and he is entitled to the benefit of the doubt. For this reason alone the cause should be reversed.

The second class, viz., women, in my opinion, constitute another exception to the rule of equitable estoppel. How many of us, alas! have been disappointed by their "language and conduct," which have led us to do what we otherwise would not have done, and have subjected us to "injury by disappointment." And I may remark that when married, or the more they are married, the greater their liability of indulging in that line of "language and conduct" leading to "disappointment," which constitute an infraction of the vital principles of an estoppel *in pais*. Inherently they have no reverence for an estoppel, and education, precept and example are wasted upon them in this regard. It has therefore come to be recognized as a fixed and primal condition of society that the class of beings otherwise normal in mental and moral endowments, inviting in appearance, bewitching in their ways, and necessary in the economy and perpetuity of the race, are not naturally, and cannot be by education, subject to the rules of an equitable estoppel. Interrogate the first one you meet upon this subject, and she will inform you that she neither knows or cares anything about it. If a recognition and observance of equitable estoppel were a requisite of admission to the celestial kingdom, no woman would enter therein.

Moses Scott may be a woman. It is not a safe rule to judge of the sex by name. Were a case here involving the copyright of any of the works of George Eliot or Mrs. Partington, we would commit grievous error in concluding that the former was a man and the latter a woman. So with the case at bar: the record being silent, we must again give him, or her, the benefit of the doubt. Although the records refer to Moses Scott as a man, meaning thereby the

male gender, yet we know that the word "man" is generic in its nature, and that "man" often embraces "woman." Indeed, the statutes of the State of Washington, paragraph 1711, 2nd Vol. Hill's Code, declare that "words importing the masculine gender may be extended to females also."

Under the common law women had no legal existence; if a *feme sole*, she could only act through a guardian or other proper representative. If married, her identity merged in her husband. Through the guardian and husband the law of estoppel applied.

Owing to the intervention of the statutes of the State of Washington, this common law status, whether wisely so or not, has been abolished; and this large class of persons, without any previous preparation, and in many instances against their protest, have been suddenly thrust into the legal world, with all the rights and privileges which theretofore belonged exclusively to the male sex. It is a maxim of the land that he who avails himself of the profits and privileges of a new relation must also assume its losses and burdens. This they persistently refuse to do. They claim the privileges, but decline the burdens. Any attempted legal coercion on the part of this Court would be both officially and personally not only unwise, but productive of domestic revolution. The substitution of the principles of an estoppel *in pais* in place of family prayers, in my judgment, could not be successfully accomplished. As an answer to a complaint in the ordinary action under the chapter of Domestic Relations, entitled "Curtain Lectures," it would be stricken out as sham and frivolous. Over all other subjects and persons this Court possesses plenary power, but in this regard both its jurisdiction and decrees are set at naught.

Excluding minors and women, the rest of the world may be appropriately divided into two classes, viz., the *compos mentis* and the *non compos mentis*. Regarding the second class I am firmly convinced, both by precedent and observation, that they ought not to be held to the strict rule of estoppel *in pais*. The real difficulty is in determining to which class a particular individual belongs. I know of no universal rule by which they may be measured, nor any safe criterion by which we may judge. Different tribunals would arrive at different conclusions, and consequent confusion result therefrom. The rule adopted to-day may be abrogated to-morrow. Keepers of asylums for the insane usually regard their inmates as lacking in right reason, while the inmates themselves are firmly convinced that their keepers are the only crazy ones.

Separate the two classes as carefully as we may, and each will unanimously declare the other to be *non compos*. I do not refer simply to those who have been adjudged insane and placed in confinement, but to mankind in general; for I am convinced that a majority of people who are now at large would, if properly classified, be found among that unfortunate class whose deficient mental and moral endowments rightfully except them from the operations of the principles of estoppel *in pais*, as well as other rules of conduct which form the foundation and structure of enlightened reason.

Having reached this conclusion, so far as the facts are concerned, it only remains to apply certain well-known and universally recognized principles in order to reach a satisfactory result in the matter of classification. Since the foundation of our government the right of majority rule has become firmly established, otherwise minorities would rule, and our form of government would be a failure. Having, then, this rule as our guide, it only remains to enumerate the classes, and it follows as a matter of course that the consensus of opinion of the more numerous class would be that *they* constituted the sane, and therefore the governing class, while the others would comprise those who are unbalanced, and proper subjects for restraint. Should the latter class at any time outnumber the former, they would be justified in acting upon their judgment, and it would at once become their duty and pleasure to promptly declare the others to be lunatics, and guard them accordingly. In this way a peaceful, permanent and elastic system of government is provided for, consistent with the constitutional rights of all. It points out unerringly every person who ought of right to be governed by the principles of an estoppel *in pais*, and mercifully excepts those who are unable, by reason of infirmity, to be guided thereby.

Applying these principles to the case at bar, we are met at the outset with absolutely nothing in the record to guide us as to whether the plaintiff in error belongs to the class to which an estoppel *in pais* should apply. We can indulge in no presumptions; we must be sure we are right before we can go ahead. Because of this silence in the record, I am in favor of a reversal of the cause, to the end that the trial court shall proceed to the investigation of the cause upon the three points named, viz.: Was Moses Scott a minor, a woman, or *non compos mentis*. If found to be within either class, then he, or she, as the case may be, would not be estopped. If, however, found to be a man, twenty-one years of age or over, and of sound mind, in such event his voluntary disappearance, whether by

death or otherwise, for a period of seven years, constitutes such an act on his part as to thereafter estop him from coming to life, and especially from claiming any property sold under the order of the Probate Court.

Another question presented by the record is of still graver import, regarding which the majority opinion is significantly silent.

The decree of the Probate Court recites the murder of Moses Scott in 1881, the date of his disappearance, and also shows an unexplained absence thereafter of seven years, resulting in death by presumption. It is then adjudged that "Moses Scott is dead to all legal intents and purposes," having died on or about March 25, 1888.

It is thus shown that he came to his death twice — first in 1881, by violent means; second in 1888, by reason of seven years' prior absence. By the institution of this suit it is evident that he has arrogated to himself the right of individual resurrection prior to the general resurrection, thus taking an unfair advantage of nearly all who have heretofore departed this life. Shall we recognize his right so to do? I should be satisfied to pass this point in silence were it not that his death became a matter of judicial record; and however he may or may not be able to justify such irregular resurrection, and whatever objections may be urged against such action by the world in general, nevertheless, owing to his premeditated violation of the order of the Court which declared him dead, and which ought to remain operative until all are permitted to participate in a general resurrection, it becomes our duty to take notice of his action in this regard, by reason of the respect due to the decree of the Court having original jurisdiction. By permitting him to come to life and resuming all rights forfeited by death, in the face of the decree of the Probate Court, we not only allow him to annul at pleasure the decree of that Court, but also aid and abet him in such unlawful and illegal acts. Shall we thus hold up to contempt the record of another Court, a Court whose decrees are as sacred as our own? I cannot assent to such a proposition, nor discover any reason or justification for so doing.

Happily, the decree itself furnishes a complete and satisfactory solution. As before quoted, the finding of death is "to all legal intents and purposes." In Dumont v. United States, 8th Otto, page 142, this Court held "that the word 'or' is frequently construed to mean 'and,' and *vice versa*, in order to carry out the evident intent of the parties." Under this rule we are compelled to construe the decree as reading that Moses Scott was dead to all legal intents

" or " purposes. Separately stated the decree is: (*a*) " Dead to all legal intents " or (*b*) " dead to all purposes." This is a finding of death in the disjunctive. Can there be such a thing as a disjunctive death? Had the decree gone further and pointed out *which* kind of death was intended, we could readily conform to such decree; but it would be unjust to ask us to decide that point, having only the bare recital before us, with none of the proofs submitted at the hearing. There is a wide difference between " death to all legal intents " and " death to all purposes." Death to all " legal intents " is nothing more than " civil death," that is, " dead to the law," leaving him fully alive as to his corporeal existence; while " death to all purposes " includes not only civil death, but an absolute end of physical existence. Now, the Probate Court found that one *or* the other existed; being in doubt upon that proposition, it wisely entered that doubt in the decree; the doubt still exists, and until it is removed by the same court, or some court having the right to determine the fact, we can do no more than reverse the cause and remand it for further action in accordance with our decree.

In conclusion I desire to call attention to the fact that, by the undoubted inherent power which I possess as Chief Justice of the Supreme Court of the United States, I have the right to insist that this opinion shall be entered of record as the decree of this Court, and that the other opinion, in which the other Judges have joined, shall stand simply as a dissenting opinion; and were it not that the balance of the Court has arrived at a correct result, I should deem it my duty to exercise such prerogative. And while I have not deemed it necessary to refer specially to the false premises, and consequently irrelevant argument based thereon, in which the balance of the Court has indulged at great length, I am satisfied that a comparison of the two opinions will result in an elimination of the errors into which they have fallen, and will especially rescue the authorities cited by them from doing duty in a cause foreign to themselves.

CHAPTER XIV.

I DECLINE THE DECISION.

As the Official Communicator finished reading the decision, he slowly folded the document, and with great deliberation placed it again in his pocket. This done, he turned his gaze on me, and seemed to await my pleasure.

"Do I understand by this," I inquired, "that I have the right to come to life?"

"I am inclined to think this question is not passed upon," he replied. "The Court has reversed the decision of your State Court, and you are now at liberty to enforce your rights."

"Which only means," I said, "that I can take this certified copy of the decision and a deputy sheriff, and go out to the ranch and take possession; and if McNeal resists we can pitch him out."

"By no manner of means," said he.

"What is the good of the decision, then, if I can't get my property by it?"

"Just this," said he; "when this decision is entered of record at Washington, it will be certified to your Supreme Court, and that Court will certify it down to your Superior Court, and in due time that Court will take the case at the point where it went wrong at first, and the after proceedings must be in conformity to this decision."

"I don't understand it at all," I replied. "I came back to life for the purpose of straightening out certain matters. I sued for this property. The State courts all said I was dead, and had no right to come to life, and what I want from your Court is a decision on this point. I don't care a sou bawbee for the property; it is the principle."

He gazed at me sadly and somewhat suspiciously. "My dear sir," he said at length, "the great body of which I am the official representative is not an ecclesiastical court, nor a school of moral philosophy. It does not deal in abstract principles. Questions of science, politics or religion are not within its jurisdiction. It deals only with personal and property rights. This decision guarantees your property rights, and if satisfactory to you please so signify, as I must immediately return."

I was not at all satisfied, and I was determined not to stultify myself by saying I was.

"It is like this," I replied; "I want to know what rights a man surrenders, and what he retains, when he dies. You say the Court has not and cannot pass upon this question. So be it. I decline to accept the decision as satisfactory."

This ended our interview, and the Official Communicator thereupon took his departure. I learned afterwards that he duly reported to the Court that I declined to accept the decision, whereupon it produced a great uproar. Such a thing as a litigant refusing to

accept a decision which granted all he asked had never before happened, and inasmuch as by the rules of the Court the unsuccessful litigant could not be consulted, it was a matter of grave concern and many consultations as to just what should be done. The question was seriously considered as to whether or not I was guilty of contempt of court, and whether they could not summarily cite me to show cause why I should not accept the decision, or be punished for contempt. They reasoned that if this sort of thing were permitted in my case, others might pursue the same course, and it might eventually result in precluding the entry of final judgment in all cases, thus practically abolishing the Court, and the several offices held by them, which, being life positions, with great honor, dignity and emoluments attached, were not to be, and could not be abrogated save in a lawful and constitutional manner, viz., death, resignation or retirement. Never since the consideration of the celebrated case of Dred Scott — a distant Ethiopian relative — had the Court been so exercised or divided. Upon one point the Court was unanimous, viz.: That the Court had the undoubted inherent power to protect and perpetuate itself, and provide for the continuous and orderly dispatch of business.

Upon strictly interrogating the Official Communicator they became informed of the ground of my objection, whereupon they were greatly amazed and in still greater perplexity. It was evident to them that I was of unsound mind, unbalanced at least, if not an outright lunatic, and therefore not capable in law of assenting or refusing. They therefore appointed for me a guardian *ad litem*, obtained his formal consent, and directed that judgment reciting such facts be entered.

* * * * * * * * * *

CONCLUSION.

The startling but evidently veracious account of the experience of Mr. Scott, as detailed in the preceding chapters, ends abruptly; and the evident reason therefore is that he seems to have disappeared in a more mysterious manner than he did in 1881, when blown from the deck of the *Golden Horn*. It is due to the reader that these later facts be made known; therefore I, his friend, who am unknown, and still desire to remain in oblivion, have felt it my duty to appear as *amicus curiæ*, and detail specifically the facts relating to his final disappearance. I enter upon this task, however, with some misgivings,

for it is possible that his disappearance was voluntary, having in view some well-defined object, or with the intent to still prosecute his labors in defense of the rights of persons declared dead by the law; and it is not only possible, but fairly to be inferred, that he may again appear, or materialize, and thus be able in person to explain the events which I am now about to relate. Should he do so, and his statement, either in detail, design or intent, vary from mine, it were needless to add that my history of the events must give way to his. With this understanding, and with a desire to be as exact and truthful as Mr. Scott evidently has been, I will proceed.

Mr. Scott was known to be an ardent sportsman, and in its truest sense was a disciple of Walton. To such an one the facilities offered by Puget Sound and its arms and inlets are unsurpassed. Every variety of that noble fish, the salmon, are to be found within its waters. A light boat, a simple tackle, and one of the glorious days which is only found on Puget Sound, are the only accessories necessary. I had accompanied him on one of these excursions, and we had floated down with the tide some four or five miles from Olympia; I was caring for the boat, while he looked after the trolling lines. Our success had been ample, and we were rather listlessly enjoying the hour than looking after the sport. I remember that he took from his pocket a peculiar looking metal flask, from which he unscrewed the top. Just as he was in the act of raising it to his lips there came a sudden splash in the water some fifty feet away, and the sunlight and spray danced on the golden sides of a noble salmon, while the tightening of the line and its swish in the water gave evidence that the strike was on and the battle opened.

Mr. Scott seemed to take in the situation at a glance, for he turned quickly to the line and seized it, at the same time unconsciously flinging away the flask in his hand. It touched the side of the boat, balanced a second, then noiselessly sank to the bottom, some three hundred feet below. In the meantime Mr. Scott began a battle royal with the salmon, which fought with desperation. Slowly but surely the end drew near, the rushes and struggles became less furious, and surrender seemed at hand. Holding the line in one hand, Mr. Scott took the landing-net in the other preparatory to lifting the fish into the boat. Like a flash the quarry seemed to have regained new life, for he sprang from the water full length, his mouth wide open, and with a convulsive effort shook the steel barb from his mouth, regained the water and slowly swam away. My interest in the fight kept my gaze concentrated upon

the salmon, and I paid but little heed to the fisherman. As the fish disappeared in the blue waters of the sound, I turned my attention to Mr. Scott, expecting the usual ejaculation in which a sportsman will indulge when sudden defeat displaces confident victory. He was standing with the limp line in one hand, the landing-net in the other, while his gaze seemed to pierce the waters which had swallowed the game from mortal vision. For perhaps ten seconds he stood there, motionless, and then — something seemed to obscure my vision, as my companion seemed to become dim and nebulous, and like a vanishing picture upon the screen, he slowly faded from sight. I was like one in a dream. I rubbed my eyes and gazed about at the water, the woodlands, the sky, at everything, in a vain effort to regain my normal equilibrium. The denouement had been so totally unexpected, so weird and unnatural, so supernatural, in fact, that it was a long time before I could shake off the effect. He was gone — had literally " vanished into thin air," with nothing left but the landing-net and line as evidence of his former presence.

This is all I can tell — all there is to tell, for the deed which was placed in escrow has fulfilled its mission, and been delivered to its rightful possessor.